* Together with U.S. v. Sandra & Dennis Fishing Corp.

No. 192

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1404/73

In the Matter of the Petition of
UNITED STATES OF AMERICA
as Owner of the USCG 95321, in a Cause of Exoneration
From or Limitation of Liability
CLARENCE ROBERTS, ET AL.,
CLAIMANTS, PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Clarence Roberts, and other claimants, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit which affirmed the decree of the United States District Court for the District of Massachusetts in so far as it denied exoneration of liability and set aside the said decree in so far as it denied limitation of liability

with instructions to enter a new decree granting limitation of liability in a cause for exoneration or limitation of liability.

I. Opinions Below.

The opinion, findings and conclusions of the United States District Court for the District of Massachusetts by Judge Andrew A. Caffrey are printed in the appendix hereto (A. 1-30), are annexed to the record of the Court below (R. 541-570) and are reported in 255 F. Supp. 737. The opinion of the Court of Appeals is printed in the appendix hereto (A. 32-49), is annexed to the record of the court below (R. 899-916) and is reported in 372 F.2d 189.

II. Jurisdiction

The decision and judgment of the United States Court of Appeals for the First Circuit sought to be reviewed was decided and entered on January 26, 1967, is annexed to the record of the court below (R. 899-916), and is appended hereto (A. 32-49). A petition for rehearing was duly filed in the court below (A. 51) and denied on February 23, 1967 (R. 923, A. 52). It is printed in the record of the court below (R. 917-923).

The jurisdiction of the District Court is based on 28 U.S.C. Sec. 1333 and 46 U.S.C. Sec. 185 granting district courts of the United States jurisdiction over admiralty or maritime matters and requiring a petition for limitation of liability to be brought in admiralty. The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 U.S.C. Sec. 1254 (1) and 2101(c).

The reasons for invoking the jurisdiction of this Court

are (1) that the Circuit Court of Appeals for the First Circuit has restricted the duty owed by the United States Coast Guard on a Search and Rescue (SAR) mission to warn the disabled vessel of any of its incapabilities to perform the said mission and to exercise due care in its performance with no duty upon the part of the Government to use due care to maintain its vessels and equipment in reasonably good working order, contrary to a decision of this Court (*Indian Towing Co.* v. *U.S.*, 1955, 350 U.S. 61, 69); (2) that the said Circuit Court of Appeals has misapplied the law pertaining to a voluntary salvor at sea to a situation where the Government has undertaken SAR missions on a grand scale with excellent vessels and equipment; (3) that this case involves the interpretation of a Federal Statute (Public Vessels Act, 46 U.S.C. Sec. 781, 783, read in pari materia with Merchant Vessels Act, 46 U.S.C. Sec. 742 and affects the rights of all persons involved in SAR missions conducted by the Government at sea, in the air or on land; and (4) the Court of Appeals has set aside basic findings of the District Court that were not *clearly erroneous* contrary to clear pronouncements of this Court (*McAllister* v. *U.S.*, 1954, 348 U.S. 19, 20).

III. Questions Presented

In a petition for exoneration or limitation of liability brought by the Government for the loss of a fishing vessel with resulting deaths and personal injuries to her crew which occurred when a Coast Guard patrol boat on a routine SAR mission towed the fishing vessel on well known dangerous shoals, at night with good visibility and weather not severe, when considerably off course due to faulty navigational instruments it mistook a lighthouse for a channel entrance buoy that it was expecting, the questions presented for determination by this Court are as follows:

1. Where the Government has for a long time provided and maintained Coast Guard patrol vessels equipped with navigational instruments for SAR missions for disabled fishing vessels, engendering reliance thereon, is there no duty owed to a disabled fishing vessel that the Government is obligated to use due care to maintain the said vessel and its equipment in reasonably good working order as the Court below ruled overruling the District Court?

2. Can the Government limit its liability for death and personal injury losses within its *privity* or *knowledge* caused by faulty navigational instruments of a Coast Guard vessel when on a routine SAR mission it towed a fishing vessel on well known dangerous shoals because of the lack of any duty owed to the disabled vessel to maintain the patrol boat and its equipment in good working order as the Court below ruled overruling the District Court?

3. Can the Court below upon examining the record to determine whether the findings of fact and the conclusions of the District Court are *clearly erroneous,* adopt discarded testimony, engage in inferences of its own, select testimony that it regards as more credible and in short grant a trial de novo contrary to the clear pronouncements of this Court?

IV. Statutes Involved

The pertinent statutes involved are (1) the Public Vessels Act, 46 U.S.C. Sec. 781 et seq., of which the pertinent sections are Secs. 781 and 783, which are printed in the appendix hereto (A. 54); (2) the Merchant Vessels Act, 46 U.S.C. Sec. 741 et seq. (read in *pari materia* with the Public Vessels Act) of which the pertinent sections are Secs. 741 and 742, which are printed in the appendix hereto

(A. 55); (3) the Functions and Powers of the United States Coast Guard, 14 U.S.C., Sec. 81 et seq. of which the pertinent section is Sec. 88(a) and (b), which are printed in the appendix hereto (A. 56); and (4) the Limitation of Vessel Owners Liability Act, 46 U.S.C. Sec. 811 et seq. of which the pertinent sections are Sec. 183(a), (e), (f) and Sec. 188,which are printed in the appendix hereto (A. 56-57).

V. Statement of the Case

This is a case that affects the rights of all persons involved in SAR missions conducted by the Government at sea, in the air and on land. The respondent (Government) brought a petition for exoneration or limitation of liability for the loss of a fishing vessel (BARBARA AND GAIL) with the resulting death of five of her crew and personal injuries to four of her survivors (R. 19). This casualty occurred on December 19, 1961, shortly before 1:25 A.M. (R. 637, 639, 655) when a Coast Guard patrol vessel (95321) on a routine SAR mission, in weather not severe and in good visibility (R. 655) towed the fishing vessel on well-known dangerous shoals, Rose and Crown shoals (R. 295, A. 19), when considerably off course, 6-7 miles (R. 292-295, A. 19) due to faulty navigational instruments (R. A. 5-6, A. 24), it mistook the light of Sankaty Head Lighthouse for the light of Great Round Shoals (GRS) buoy that it was expecting (A. 14-17, 24).

After a lengthy trial, the District Court rendered an opinion containing its finding of facts and conclusions (A. 1-30) and entered a decree thereon denying both exoneration and limitation of liability (A. 31). In summary, the District Court Judge held that since the Coast Guard undertook a SAR service and operated a SAR organization, engendering reliance on the competent assistance usually afforded by the vessels engaged therein,

it was obligated to use due care to maintain said vessels and their equipment in reasonably good working order; *and* if the said vessels and its equipment were not reasonably fit for the job, then the Coast Guard was *further* obligated to use due care to discover said fact and to repair them or give warning of their unfitness, paraphrasing the language used by this Court in *Indian Towing Co.* v. *U.S.*, 1955, 350 U.S. 61, 69 (A. 21-23).

The District Court concluded (1) that the Coast Guard assigned to the mission, a vessel equipped for a long time with a defective loran, a defective gyro-compass and repeater, a defective fathometer and a totally inoperative radio direction finder, RDF, (A. 24); (2) that under the Coast Guard rules and regulations the commanding officer of the patrol vessel (McManus) was left the decision of determining his vessel's incapabilities and to report the same to Headquarters (A. 24);[1] (3) that McManus was negligent in not informing Headquarters that the vessel (95321) was incapable of performing the mission due to this mass of defective equipment, in nevertheless undertaking the mission and in not informing the fishing vessel that it was navigating with all this defective equipment (A. 24); (4) that McManus was negligent by relying on his defective loran, assuming he got accurate readings therefrom and by failing to obtain the use of the loran of the fishing vessel which was available (A. 24); (5) that McManus was negligent by failing to identify Sankaty Head Light and mistaking it for Great Round Shoals Buoy light when both were plainly distinguishable (4 24); and (6) that these negligent acts and omissions were the

[1] At the time of this mission SAR vessels were not required to report to SAR Headquarters their incapabilities subsequently corrected (R. 149-150, A. 29). However, there was a General Prudential Rule which required a commanding officer assigned to a mission to report to SAR his vessel's incapabilities (R. 150, 607, A. 29).

proximate causes of the losses suffered by the petitioners (A. 24).[2]

The District Court denied limitation of liability because McManus was an "executive officer" within the rule laid down by this Court in *Coryell* v. *Phipps*, 1942, 317 U.S. 406, 410-411, for he had been made the sole judge to determine his vessel's capabilities by reason of the General Prudential Rule (A. 24, 29-30) and Waters had delegated his responsibility of determining the CG-95321's fitness for the mission when he rubber stamped McManus' judgment that he required no further relief, stating that the commanding officer is the best judge of whether the mission can be accomplished (A. 29-30).

McManus delayed 2½ hours in reporting that his tow line had parted, requested relief by a larger vessel, reported wind of 35-45 knots and seas East at 10-12 feet and stem of fishing vessel was weakened (R. 659). This message was received at Headquarters at 8:47 P.M. on December 18th. The guide lines for selecting vessels for a mission provided among other things that "during bad weather the minor patrol vessels (95321) should be kept in shore unless the emergency is extreme. Vessels under 125' in length cannot operate at maximum efficiency while Small Craft or Gale Warnings are displayed, and its safety might even be jeopardized under such adverse sea conditions" (R. 579). Small Craft warnings were posted at 6 P.M. (R. 599). Waters (Chief of SAR) was immediately informed of the parting of the tow line (R. 126). He ordered the C.G. Fred Lee on B6 status (able to get ready in 6 hours) to be alerted. This message was received at SAR Headquarters at 9:38 P. M. on December 18th, a few minutes before a message was received from the

[2] There were other negligent acts or omissions found such as failing to take the southerly route which was slightly longer but shoal-free (R. 359-360, A. 24).

95321 that it had succeeded in reattaching the hawser and commenced towing Northeast (R. 631). A message was sent at 9:40 P. M. ordering the Fred Lee to relieve the 95321 of its tow and another to the 95321 to continue with the fishing vessel until relieved by the Fred Lee (R. 633). Waters had ordered a message sent to the 95321 not to pick up the tow but before this was sent the 95321 had reattached the tow (R. 151, 553). At 11:24 P. M. on December 18th, Headquarters received a message from the 95321 enroute to New Bedford, "no further relief required" (R. 635). Upon receipt of this message Waters regretfully concurred and cancelled Fred Lee's orders, stating that the commanding officer on the scene is the best judge of his vessel's capabilities (R. 152, 637). The District Court found that at this time the 95321 was being operated in weather contrary to the Coast Guard's guide lines (A. 29-30, R. 579).

The court below on review of the opinion of the District Court and upon examination of the record affirmed the decree of the District Court insofar as it denied exoneration of liability and set aside the said decree insofar as it denied limitation of liability with instructions to enter a new decree granting limitation of liability (A. 49). It affirmed that part of the decree denying exoneration of liability because it held that the duty of the Coast Guard was to perform an SAR mission with reasonable care (A. 41, 45), and held that (1) when McManus last set his course for New Bedford at 11:00 P. M. on December 18th, his loran position was inaccurate for he could not possibly have stranded where he did if it were accurate (A. 44); (2) McManus placed false confidence upon his defective loran and assumed he got correct positions from it (A. 42-43); (3) that at 11:45 P.M. on December 18th, when his loran broke down completely, he shut it off and failed to avail himself of the loran of the fishing

vessel which was available for the asking (A. 43-44); (4) and had he done so, he would have discovered his error and the casualty would have been avoided (A. 45).

The Court below set aside the decree of the District Court denying limitation of liability because (1) there is no duty owed by the Coast Guard to a disabled vessel to use due care to maintain its vessels and their equipment in reasonably good working order (A. 40-41); (2) that the only duty owed to a disabled vessel is to warn it of any unfitness for the mission and exercise good seamanship in performing the mission (A. 41); (3) that there was no duty to warn the fishing vessel in this case because the court below rejected the District Court's finding that the 95321 was not fit for the mission and substituted its own finding that it was, adopting the testimony of Waters that the mission could be accomplished at the time it was commenced, having in mind the moderate weather and good visibility, in spite of its mass of defective navigational instruments[3] (A. 41-42); (4) that since there was no duty owed to the fishing vessel to maintain its vessels and equipment in reasonably good working order, the presumed knowledge of Waters, an admitted "executive officer", and for that matter the presumed knowledge of McManus was irrelevant (A. 48); (5) that McManus' failure to report his vessel's deficiencies to Headquarters under the General Prudential Rule (R. 607) was irrelevant because of the finding of the Court below that the 95321 was able to perform the mission using the loran of the fishing vessel (A. 49); and (6) that Waters' rubber stamping of McManus' judgment that no further aid was required was not negligent nor did it elevate him to the

[3] The Court below said that Waters could have added a further fact that the 95321 had available the loran of the fishing vessel for the asking (A. 42, footnote 14).

rank of an "executive officer" to permit limitation of liability for other faults (A. 48).

VI. Argument

1. The Government is obligated to use due care to maintain its Coast Guard patrol vessels and its equipment engaged in SAR missions in reasonably good working order.

The Government undertook SAR as a governmental function on a grand scale (R. 74-75, 146-147, A. 22) which it was permitted to do by statute (14 U.S.C. Sec. 88(a)(1), and (b)), and directed to do by the National Search and Rescue Plan promulgated in March, 1956 by the President's Air Co-ordinating Committee (*United States* v. *Gavagan*, 280 F.2d 319, 322, 5th Cir. 1960). These services are well publicized, known to mariners who rely upon and avail themselves of them (A. 22-23).

The Government had consented to be sued for damages caused by a public vessel or its personnel where a proceeding in admiralty could be maintained if such vessel were privately owned (Public Vessels Act, 46 U.S.C. Sec. 781, 783 read in *pari materia* with Merchant Vessels Act, 46 U.S.C. Sec. 742; *Blamberg Bros.* v. *United States*, 1923, 260 U.S. 452, 458; *Canadian Aviator* v. *United States*, 1945, 324 U.S. 215, 224-225). The duties owed by the Government are likened to that of a private person only in such situations where private persons rendered the same services *under like circumstances* and to the extent that the circumstances differ, the duties owed by the Government vary but do not fail (*Indian Towing Co.* v. *United States*, 1955, 350 U.S. 61, 68-69; *Rayonier, Inc.* v. *United States*, 1957, 352 U.S. 315, 319-320; *United States* v. *Gavagan*, 280 F.2d 319, 327-328).

The duties owed by the Government should not be compared to that owed by a vessel at sea which voluntarily goes to the aid of another vessel in peril (a Good Samaritan) but rather to one in the business of salvage on a scale equal to that of the Government. In this regard the case of *Kermarec* v. *Compagnie General Transatlantique*, 1959, 358 U.S. 625, 630-632 has application. In that case the court held that the degrees of care known to the common law are not suitable for the maritime law.

The District Court correctly paraphrased *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 holding that the Government was obligated to use due care to maintain its vessels and equipment in reasonably good working order *and*, if the vessels were unfit it was *further* obligated to use due care to discover that fact, repair it or give warning of its unfitness (A. 23). The Court below unduly restricted the duty owed by the Government to warning the disabled vessel of the patrol vessel's unfitness for the mission and exercising good seamanship in performing the mission (A. 40-41, 45).

2. The Government cannot limit its liability for death and personal injury losses caused by faulty navigational instruments of a Coast Guard patrol boat on a SAR mission within its presumed *privity* or *knowledge*.

The Shipowners Limitation of Liability Act permits a shipowner to limit his liability for a loss incurred without his *privity* or *knowledge* to the value of his interest in the vessel (46 U.S.C. Sec. 183(a), but for loss of life or bodily injury the *privity* or *knowledge* of the master of a *seagoing vessel*, at or prior to the commencement of the voyage shall be deemed conclusively the *privity* or *knowledge* of the owner of such vessel (46 U.S.C. Sec. 183(e), and the term *seagoing vessel* shall not include pleas-

ure yachts, tugs, towboats, *towing vessels*, tank vessels, fishing vessels, or their tenders, self-propelled lighters, nondescript self-propelled vessels, canoe boats, scows, car floats, barges, lighters, or nondescript-propelled vessels, even though the same may be *seagoing* vessels within the meaning of such term as used in section 188 of this title (46 U.S.C. Sec. 183(f)).

Knowledge as that term is used in the Shipowners Limitation of Liability Act (46 U.S.C. Sec. 183(a) and (e) includes the *means of knowledge* and where the owner is corporate, the terms *privity* or *knowledge* includes that of "an executive officer, manager or superintendent, whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred." (*Coryell* v. *Phipps*, 317 U.S. 406, 410-411; *The Cleveco*, 1946, 154 F.2d 605, 613-614, 6th Cir.; *Austerberry* v. *U. S.*, 1948, 169 F.2d 583, 594, 6th Cir.; *States S.S. Co.* v. *U. S.*, 1958, 259 F.2d 458, 464-465, 3rd Cir.).

The CG-95321 is a *seagoing vessel* and not excluded by the term *tow boat* within the meaning of those terms as used in the Shipowners Limitation of Liability Act (46 U.S.C. Sec. 183(e) and (f), Sec. 188). Her home base was Newcastle, New Hampshire and she was used for SAR missions. At the time of this mission she was assigned to the Vineyard Patrol whose area of operations was bounded by 71° W, 69° W, 41° N and a line extending due east of Chatham Life Boat Station (R. 147-148, 167, 168-169, 605-607). She is not a *tug boat* within the meaning of the Shipowners Limitation of Liability Act, 46 U.S.C. Sec. 183(f) and Sec. 188 (*Petition of Bogan*, D.C. N.J., 1952, 103 F. Supp. 755; *The Trim Too*, D.C. Mass., 1941, 39 F.Supp. 271).

The Court below held that the Coast Guard owed no duty to a disabled fishing vessel to use due care to maintain its vessel and equipment in good working order and

hence the presumed knowledge of Waters, an admitted "executive officer" and the knowledge of McManus under 46 U.S.C. Sec. 183 (e) and (f) were irrelevant (A. 48).

Coast Guard District One (CGD 1) knew that the fathometer was of little operational value (R. 851-852) and the local inspectors knew that the loran was troublesome from its installation in March, 1961 and neither were corrected (R. 847-849). Although the gyro-compass was installed for evaluation in October of 1961 it was never evaluated prior to the mission (R. 880-882). The electronic maintenance department worked upon both the loran and the fathometer, were unable to correct its defects and had knowledge of its defects (R. 841-843, 847-849).

At the time of the casualty there was no rule requiring a commanding officer to report his vessel's deficiencies, subsequently corrected, but under the General Prudential rule a commanding officer was required to report his vessel's incapabilities for the mission (R. 149-150, 607, A. 29). McManus was made the sole judge of his vessel's capabilities and hence was an "executive officer". Certainly Waters could have obtained the necessary information from McManus concerning the vessel's navigational equipment for the asking.

3. The Court below upset basic findings of the District Court that were not *clearly erroneous* contrary to clear pronouncements of this Court.

On review the findings of a trial judge sitting in admiralty may not be set aside unless they are *clearly erroneous* and a finding is *clearly erroneous* when, although supported by evidence, "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" and the credibility of the

witnesses is for the District Court (*McAllister* v. *U. S.*, 1954, 348 U.S. 19, 20; *Guzman* v. *Pichirilo*, 1962, 369 U.S. 698, 702; *Morales* v. *City of Galveston*, 1962, 370 U.S. 165, 167-168).

The District Court denied limitation of liability in part because an improper vessel was dispatched for the mission due to its mass of defective navigational instruments and McManus by reason of the General Prudential Rule was made the sole judge of his vessel's capabilities (A. 29-30).

The 95321 was a 95 ft. vessel of shallow draft and a poor sea boat (R. 148). It was dispatched on this mission in violation of the Coast Guard's guide lines that a 95 footer was not to be sent out in the winter time more than 50 miles from its base (R. 579-580). The 95321 was based at Woods Hole and was dispatched to a disabled (rudderless) fishing vessel 52 miles S.E. of GRS buoy (R. 589-654). Her RDF, fathometer, magnetic compass and loran were either inoperative or defective for a long time (A. 4-6). Although the predicted weather was winds of 10 to 15 knots, with seas of from 2-4 ft. (R. 585) and the on scene weather was good (R. 338-339, 589) such predictions were not assurances of the weather to be encountered and subject to the usual changes in New England weather. There was no need for any expert opinion to support the District Court's finding that the 95321 was an improper boat for the mission (*Salem* v. *U. S.*, 1962, 370 U.S. 31, 35-36).

The District Court could reject the testimony of Waters that considering the predicted weather and good visibility the mission could have been accomplished in spite of the mass of defective navigational equipment. The issue is whether it was proper to send such a vessel out and not whether the mission could be accomplished. The value of expert opinion is to aid the court in deciding the issue but not to bind it and the credibility of the testimony is

for the district court (*Guzman* v. *Pichirilo*, 1962 369 U.S. 698, 702). The Court below could not adopt Waters' opinion in preference to the District Court's finding that an improper vessel was dispatched on the basis that the District Court's finding was *clearly erroneous*.

The Court below upset the finding of the District Court that the defective navigational instruments of the 95321 was a cause of the grounding of the fishing vessel with resulting loss of lives and personal injury to her crew. The Court below held that there was no proof that the RDF was of any special value (A. 36 footnote [3]); that the fathometer would have made any difference in view of the fact that the fishing vessel had her fathometer guarded and did not pass over shoal water (A. 37 footnote [4]); that a 3° error of the gyro-compass was not significant (A. 42); and finally that the 95321 had available the fishing vessel's loran for the asking (A. 49).

The finding of the Court below that the defective loran of the 95321 was not the cause of the accident because of the availability of the fishing vessel's loran is untenable. The Government's duty to maintain the loran of the 95321 in good working order is not lessened by the fact that the fishing vessel had a good loran (*Mahnich* v. *Southern S.S. Co.*, 1944, 321 U.S. 96, 103, where the court said that the fact there is good rope aboard the ship does not excuse the presence of defective rope). The Court below having found that had McManus availed himself of the fishing vessel's loran, the casualty would have been averted (A. 44, 45), it would follow that the casualty would have been averted had its own loran been in good working order for then there would be no need to use the fishing vessel's loran.

VII. Conclusion

For the above reasons, especially those enumerated in this petition (2-3), a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
IN THE MATTER OF PETITION OF
THE UNITED STATES OF AMERICA,
AS OWNER OF THE UNITED STATES
COAST GUARD VESSEL CG-95321,
FOR EXONERATION FROM OR LIMITATION OF LIABILITY.
IN ADMIRALTY NO. 63-27-C

OPINION

June 30, 1966

CAFFREY, D. J.

These proceedings were commenced by the United States as owner of Coast Guard Vessel CG-95321 under the Limitation of Liability Act, 46 U.S.C.A. 183-188, for exoneration from or limitation of liability arising out of the sinking of the Fishing Vessel BARBARA AND GAIL, which went down on December 19, 1961 with the loss of lives of five of her crew when the CG-95321 towed her onto the rocks of Nantucket Shoals. Claims against the United States have been brought by the Sandra & Dennis Fishing Corporation as owner of the F/V BARBARA AND GAIL by the personal representatives of the five members of her crew whose lives were lost, and by the surviving members of her crew for personal injuries and loss of personal effects. After trial I find and rule as follows:

At all times material to this action the United States was the owner and operator of CG-95321, a patrol boat of 90 gross tons, 95 feet in length, 18 feet in breadth, with a normal draft of 4 feet forward and 6 feet aft. She was powered by four 600 horsepower diesel engines on two shafts, with a maximum speed of 21½ knots and a minimum speed of

7 knots. The home port of the CG-95321 was New Castle, New Hampshire, but at the time of the incident hereinafter described she was assigned to a search and rescue patrol on which she operated out of Woods Hole, Massachusetts.

The BARBARA AND GAIL was a wooden-hulled fishing vessel 90 feet in length, 19 feet in breadth, with a maximum draft of 10 feet. She was owned by the Sandra & Dennis Fishing Corporation, whose president and treasurer was Captain Sheldon S. Kent, and who was also the master of the vessel.

On December 16, 1961, the BARBARA AND GAIL left New Bedford, Massachusetts, with a crew of 10 men aboard, including Captain Kent, on a commercial fishing voyage to Georges Bank. She was equipped with radar, a fathometer, two loran receivers, a magnetic compass and a radio telephone, all of which were in good operating condition. On the morning of December 18, at about 6:15, Captain Kent discovered that the BARBARA AND GAIL had lost her rudder.

At about 7:50 a.m., on December 18, the Coast Guard Rescue Coordination Center (RCC) at Boston received a call through the Boston marine operator from the BARBARA AND GAIL requesting Coast Guard assistance. The RCC Controller on duty was LTJG Edward J. Crane, who talked with the BARBARA AND GAIL and was advised that she was disabled with a lost rudder but in no immediate danger and that she requested a tow to New Bedford. The message gave her communications facilities and identifying characteristics, and gave her position in loran coordinates and as 52 miles southeast of the Great Round Shoals buoy. This buoy marks the seaward entrance of a channel between the Atlantic Ocean and Nantucket Sound through the shoals between the eastern side of Nantucket Island and the southeast tip of Cape Cod. The message gave no weather information, but the weather on the scene at the time was fine, with no wind to speak of and just a little chop to the sea.

The search and rescue (SAR) functions of the Coast

Guard are coordinated in the New England area by the Rescue Coordination Center (RCC) of the First Coast Guard District, whose geographic area encompasses the Atlantic Ocean from Montauk Point, at the tip of Long Island, out roughly 1500 miles beyond Cape Cod, into the Labrador Sea. In the coastal waters off Massachusetts the First Coast Guard District kept two vessels at all times standing by on patrol for SAR missions. One of these patrols was the Provincetown patrol, whose patrol area was generally between Cape Ann and Chatham, on Cape Cod. The other was the Vineyard Sound Patrol, whose patrol area was generally from Chatham on around past Buzzards Bay. The Vineyard Sound patrol vessel, when not on a mission, was permitted to moor at Woods Hole, Massachusetts.

Both patrol vessels are on so-called "Alfa" status, which means either underway or ready to get underway in 15 minutes. The two patrol vessels are referred to as the major Alfa and the minor Alfa, the major vessel being a larger vessel such as a seagoing tug or ocean station vessel ordinarily assigned to Provincetown with access to the open ocean, and the minor patrol vessel being a 95, 110 or 125 foot patrol boat assigned to Vineyard Sound. Other Coast Guard vessels are in so-called "Bravo" status, ready to get underway within a specified maximum number of hours. On December 18, 1961 the Alfa vessel on the Vineyard Sound patrol was the CG-95321, a 95 foot patrol boat.

On receipt of the message from the BARBARA AND GAIL, Crane checked his weather reports and the status board giving the position of all available search and rescue vessels. The weather reports for coastal waters off New England were normal, predicting winds of from 10 to 15 knots, with seas of from 2 to 4 feet. His status board disclosed that of the two SAR patrol vessels, the Provincetown vessel was committed to another mission from which it was

not to be diverted if there were other SAR vessels equally available and that the closest and most immediately available other Alpha vessel was the CG-95321, which was on the Vineyard Sound Patrol. He accordingly dispatched the CG-95321 to assist the BARBARA AND GAIL, by message which was sent from RCC at 8:00 a.m.

Under his routine instructions the RCC Controller could not dispatch a 95 foot patrol boat more than 50 miles offshore without the approval of his superiors. The responsible superior was Commander John M. Waters, who was then the Chief of the Search and Rescue Branch for the First Coast Guard District. He arrived at his office shortly after Crane had dispatched the CG-95321 and upon being advised by Crane of his action immediately approved it. Under the conditions then existing and predicted, the dispatch of a properly manned and equipped 95 foot patrol boat would not have been unreasonable.

The CG-95321 was manned by a crew of one officer and 14 enlisted men. Her commanding officer was LTJG Garald H. McManus, who was then 24 years old, a 1959 graduate of the United States Coast Guard Academy. After graduation he was assigned to the Coast Guard cutter BARATARIA, where he had, among other duties, served as operations officer and navigator and an underway officer of the deck. He took command of the CG-95321 in February of 1961. At the time of the trial he held the rank of Lieutenant and was assigned to duty as a navigation instructor at the Reserve Training Center at Yorktown, Virginia, where he taught beginners. He was relieved of command of the CG-95321 on January 9, 1962, 21 days after the disaster. He was then sent to school in Groton, Connecticut to "study up on loran" and then ordered to serve one year at a loran station on St. Paul's Island in Alaska.

The CG-95321 was equipped with a gyro compass, magnetic compass, radar, loran, fathometer, radio direction

finder (RDF), and various radio equipment. Her RDF had become inoperative on December 16, 1961 and not only had not been repaired prior to the disaster but had not even been reported inoperative by McManus. Her fathometer had been troublesome for some time, at one point being described in the log as "lousy," and it was useless at speeds of 10 knots or better, or in rough seas. Because of prior dissatisfaction with attempts to use the fathometer it was not even turned on during this mission until after the grounding of the BARBARA AND GAIL. The CG-95321 had lead lines for sounding depths on board but they were not used at any time during the mission.

From all that appears in the record, the magnetic compass was accurate, but it was not used. Instead, the CG-95321 was steered exclusively by the gyro compass which had been installed in September or October for evaluation. This gyro compass was inaccurate, having a consistent westerly error, usually 3 degrees off, from a true heading.* Her loran had been inaccurate and unreliable almost since the day it was installed. On March 27, 1961, just a week

*The compass comparison log, also called the compass check log, which was used to record for comparison readings taken from the gyro compass and the magnetic compass, was not produced at trial. In lieu thereof, photostatic copies of certain pages from this log were admitted in evidence as Roberts' Exhibit 15. Counsel for the Government stipulated in open court that at all material times the Coast Guard has had custody of this book and that save for the time that it was before the Marine Board of Inquiry it was aboard the CG-95321. An examination of Exhibit 15 shows that the pages of this comparison log covering the critical 77-day period from November 13, 1961, some 35 days prior to the accident, to January 30, 1962, some 42 days after the accident, were torn out of this book prior to its production as evidence at the trial. The purpose of the book, of course, is to reflect the accuracy or inaccuracy of the compass and the destruction of this evidence while the book was in the custody of the Coast Guard, and presumably in the custody of the crew of the CG-95321, gives rise to the inference, which I draw, that the information contained in the destroyed pages was adverse to the position of the Coast Guard in this case.

after it was installed, the loran was inoperative. It was again or, perhaps, still inoperative on March 30. On April 12, 1961, just six days after being returned to the boat after repairs, the loran was once again inoperative. On June 25 the log entry reports that the loran was not normal. On June 27 the log entry is "set not operating properly." The same entry appears on August 4. On August 13 the loran was inoperative. It was still inoperative on August 23. On August 24 the set was worked on with negative results. On October 17 the log reports "operation fair and under evaluation." The last entry in the log for 1961 was made on November 12, about a month before the disaster. It reads "No third function—inaccurate." No repairs were made thereafter prior to December 19. The radar aboard the CG-95321 was apparently operating normally.

The CG-95321 received her orders at 8:10 a.m. on December 18 and was underway at 8:20. She proceeded at 550 rpm out of Nantucket Sound by way of the Great Round Shoals Channel, passing the seaward fairway buoy at 11:24 a.m. As she passed the buoy and came to course 119 degrees true to head for the BARBARA AND GAIL, she reduced speed, first down to 410 rpm at 11:40 a.m., then twice more until at 3:00 p.m. she was down to 320 rpm, or 10 knots. The speed was reduced because of worsening weather. The first of a number of unexplained alterations in the ship's logs and the suspicious disappearance of records appears at this point. The log of the CG-95321 (Govt. Ex. 52) contains a notation of the course at 1300. This notation is obviously 122° marked over to read 115°. On the right hand page, which contains a running commentary on the events aboard ship, there appears a change of course notation at 1300 that is also 122° marked over to read 115°. No explanation for this change was given; indeed, although all crew members who stood pilot house watches testified, the person who made the change was never identified. It was claimed at

trial that loran fixes were taken on the way out to the BARBARA AND GAIL but no positions were logged or marked on the chart.

The CG-95321 located the BARBARA AND GAIL without difficulty, picking her up first by radar at a range of four to five miles, and arriving at her position at 3:45 p.m. By 4:00 p.m., the CG-95321 had her in tow, at a position 46 miles from Great Round Shoals buoy, the BARBARA AND GAIL having drifted to the west and south during the day. After making up the tow, the CG-95321 set a course of 304° true, rung up a towing speed of 12 knots, and headed for the Great Round Shoals Channel entrance buoy. This course made no allowance for current or drift; it was simply a straight line from the CG-95321's 1600 position to Great Round Shoals buoy. For that matter, it should be noted, the 119° true course set by the CG-95321 on the way out to the BARBARA AND GAIL made no allowance for current or for any drift on the part of the BARBARA AND GAIL while she awaited the arrival of the CG-95321.

The CG-95321 used as the towing hawser a 900 foot length of 4-inch nylon rope which was relatively new, having been aboard ship for about a month. It was paid out to a length of about 700 feet and prior to the commencement of this trip it had been wrapped in a canvas chafing gear some 3 to 4 feet in length. The aft portion of this chafing gear was slightly forward of the taffrail when the tow commenced at about 1600. The towing hawser was placed in position aboard the CG-95321 by seamen Jenkins and Garcelon at a time when she was taking some water over the fantail. Jenkins said he checked the hawser and chafing gear after fastening it and then went below and turned in. He likewise testified that he watched the hawser between 1730 and 1800 from the rear window of the pilot house and that it was riding normally with the chafing gear in position on the

taffrail. It is noteworthy that he was then serving as O.D. and had a number of other duties to perform.

Garcelon testified that he too went below after connecting the hawser and returned to deck when it parted. Seaman Nots who appears not to have been on duty at 1600 nevertheless testified that he observed the hawser from the pilot house for about an hour, then went to the ship's office, and then went below, returning to deck when the tow parted. McManus testified to fleeting checks of the condition of the hawser. It parted just aft of the chafing gear at 6:00 p.m.

Having in mind the testimony that the fantail was constantly taking water at this time, I find, first, that no one did, or testified that he did, go back to make a close and proper examination of the towing hawser and chafing gear at the taffrail. Secondly, having in mind the fact that the Court went aboard the CG-95321 at her base in New Castle, New Hampshire, in connection with certain pretrial discovery which took place thereon, and carefully examined the view from each of the pilot house windows, and having in mind the obstructions to the visibility of anyone seeking to look aft from the rear windows of the pilot house (see Roberts' Exhibits 7, 8), and the fact that it became dark at or shortly after 1630 on December 18, I am persuaded that no meaningful surveillance or inspection of the condition of the towing hawser or the position of the chafing gear was made at any time subsequent to the commencement of the tow at 1600. I find that the towing line parted because of the improper placement of the chafing gear on the towing line, compounded by the failure to maintain a proper surveillance of its condition during the tow, with the result that it was weakened by friction on the taffrail.

In so finding I have in mind that the chafing gear was successfully applied in a different way during the second tow, and that during the second tow various members of the crew went aft to check the chafing gear and the towline at

close range. On at least one occasion Garcelon had to readjust the chafing gear which had slipped so that it was no longer protecting the rope from chafing against the rail. I rule that the captain and crew of the CG-95321 were negligent in not making a proper inspection of the towing hawser at any time prior to its parting. In ruling that negligence caused the line to part, I decline to give weight to Govt. Exhibit 69, a copy of the report of L. J. Sheehan, a deceased employee of the Boston Naval Shipyard, in which an opinion is expressed as to the cause of the rupture of the towline. In declining to give weight to this report I have in mind that there is nothing before me to indicate what factors Mr. Sheehan took into account or what information was supplied to him or what assumptions he made, and that his statement is both unsworn and not subject to the probing effects of cross-examination by the other parties to the litigation.

There was conflicting evidence at the trial concerning weather conditions during this mission, especially as to conditions about the time the tow parted. All of the witnesses agreed that the weather worsened after the tow began at 1600 and that it slackened off about 10:00 p.m. Various members of the crew of the CG-95321 testified at the trial that the wind reached speeds of "40-45 knots" (McManus), "40 knots" (Nofs), "35-40 knots" (Jenkins), and "25-30 knots" (Judkins). The height of the seas was estimated as 15-16 feet (McManus), 12-15 feet (Nofs), 10-12 feet (Judkins), and 6-8 feet (Jenkins).

In contrast to these versions of the weather conditions related at the trial, the hourly entries contemporaneously made in the ship's log by the crew-members of the CG-95321 report that from 1400 on December 18 until 0300 December 19, the wind was logged as Force 6 on the Beaufort Scale, i.e., a wind of 22 to 27 knots. The log indicates that a Beaufort 6 wind is characterized as strong in United States

Weather Bureau forecasts. For the same time period, sea conditions were logged as "4," i.e., a moderate swell. This is characterized in the log as a moderate sea. At 1821 on December 18, the Pollock Rip Lightship reported winds of 28 knots, with a sea of 10 feet. The United States Weather Bureau posted small craft warnings at 1800 for the area Block Island to Portland, Maine, and predicted northeast winds from 20 to 30 knots in the south portion. Finally, Captain Kent's description of the weather conditions corresponds to the log entries of the CG-95321.

I accept the entries in the log of the CG-95321 as correctly reflecting existing weather conditions and I disbelieve the contrary testimony of the crew-members because I find that at the trial they intentionally exaggerated the weather conditions.

After drifting around for 2½ hours in a vain attempt to reestablish the tow, McManus sent a radio message, at about 2035, to the First Coast Guard District headquarters, advising headquarters for the first time that he had lost the tow some 2½ hours earlier and requesting that he be relieved by a larger vessel. Although there appears on the ship's chart what purports to be a loran fix of his position obtained by McManus at 2005, the message he sent to headquarters requesting relief at this time did not contain a report of his position. Upon receipt of this message the duty officer conferred with Commander Waters about sending out the Coast Guard cutter FREDERICK LEE which was in New Bedford on Bravo 6 status, ready to get underway within a maximum of six hours, and at 9:42 p.m. the FREDERICK LEE was ordered out.

After sending his message, McManus informed Captain Kent that he had requested relief by a larger vessel and that he intended to stand by until the larger vessel came out. In response Kent requested that the CG-95321 try to reconnect the tow because, as he put it, "I was afraid we

might be drifting down onto Nantucket Shoals." The CG-95321 made another attempt to connect the towline and succeeded. The towing hawser was reconnected at 9:05 p.m., just as Commander Waters was dictating a message, which was never sent, instructing McManus not to take the BARBARA AND GAIL back in tow. At 9:20 p.m., the CG-95321 sent a message to the First Coast Guard District which was received in Boston RCC at 9:36 p.m., about the time the FREDERICK LEE was being dispatched, advising that she had the fishing vessel back in tow. This message reported the position of the CG-95321 at 2105, a position that does not appear on the ship's chart. This reported 2105 position, which was charted on Govt. Ex. 57, is extremely close to the 2005 position, which was transposed from the ship's chart. When asked at the trial about the proximity of these positions, McManus said it was "very possible" that the loran position reported to the First Coast Guard District was "predicated upon (his) 2005 reading." In short, he either guessed at his 2105 position or reported the position he had obtained at 2005, which was either mischarted on the ship's chart or misread when taken off the chart for broadcast.

After the CG-95321 had the BARBARA AND GAIL back in tow, Kent asked that he be towed to windward, into the sea, so as not to further weaken her stem. The CG-95321 complied with his request and came to a northeasterly course at a towing speed of from 5 to 6 knots, with the towing hawser now at 600 feet. After they had been on this course for a while, McManus attempted a more northerly course, the BARBARA AND GAIL began to yaw, and at Kent's request the CG-95321 came back to the windward more. At 10:37 p.m., the CG-95321 changed course to due north. By 11:00 p.m. the weather had subsided enough for the BARBARA AND GAIL to be towed toward land. The CG-95321 came left to a course of 300 degrees true and came to a towing speed of

10 knots, heading, she thought, for the Great Round Shoals channel and New Bedford.

Before making his course change at 2300, McManus had obtained a loran position at 10:50 p.m., which he testified he considered at that time to be reliable. I find that the loran position McManus had obtained just before he turned toward shore was inaccurate and that he was in fact further south than that position indicated. In so finding I have in mind that the loran had been inaccurate and unreliable in the past, as reflected in the log entries, that the 1700 loran position which McManus had obtained placed him so far off his course that he himself considered it unreliable and disregarded it, that it failed completely one hour later, and, finally, that it is practically impossible that the CG-95321 could have begun at its 2300 position and steered a course of 300 degrees, yet run right onto the shoals in the position that she did.

At the point where he thought he was when he made his course change, the bearing of the Great Round Shoals channel entrance buoy was 292 degrees true and its distance about 18.5 miles. He set a course of 300 degrees in order to make allowance for current conditions. In determining what allowance should be made he did not consult his ship's chart, which reported current conditions, but instead relied on his limited general knowledge as to what the current was supposed to be in this area.

McManus knew that the FREDERICK LEE had been ordered out to relieve him, but after he came left to his supposed course for Great Round Shoals channel, he sent a message to Boston RCC reporting that Capt. Kent had advised him that the BARBARA AND GAIL could withstand the tow. McManus concluded this message by advising that no relief was required. The message was received at Boston RCC at about 11:24 p.m., whereupon RCC Controller Slade, after conferring with Commander Waters, who regrettably con-

curred on the grounds that those on the scene were the best judges of their conditions and capabilities, canceled the FREDERICK LEE's sailing orders.

At about 11:45 p.m. McManus attempted to get a loran reading but the third function went out and he could not obtain a fix. This was the same trouble that had been recorded in the last entry in the loran log. Even though he knew that the BARBARA AND GAIL had loran receivers, and despite the fact that he was steaming at 10 knots toward some of the most treacherous coastline in the United States, McManus, in an incredibly irresponsible act, shut down the loran without checking with the BARBARA AND GAIL from which he could have obtained a fix simply for the asking.

After shutting down his loran McManus ordered Jenkins to relieve him and he turned in. Before turning over the watch he advised Jenkins of their course and speed, the condition of the BARBARA AND GAIL, showed him what he erroneously thought was their approximate position on the chart, about 8 or 9 miles from the buoy, and advised him that the loran was out. He confidently told Jenkins that he should have no land within 15 miles, that they should be close to the Great Round Shoals buoy at 1:00 a.m., that he should sight it on his port hand, to call him when the buoy was sighted, and to call him at 1:00 a.m. in any event.

During the next hour things on the CG-95321 were outwardly uneventful as she towed the BARBARA AND GAIL toward Nantucket Shoals. Seaman Garcelon was at the helm steering a course of 300° by the inaccurate gyro compass which was relentlessly pulling the CG-95321 to the south of its intended course. The ship was yawing about 3 or 4 degrees to either side of course. Toward 1:00 a.m., Jenkins went aft to check the towing hawser, and on his return to the pilot house he saw a light to port.

The determination of the critically important question of what was done to determine the identity of this light by those on the CG-95321 in the next few minutes depends entirely on the credibility of three crew-members who were in the pilot house and who testified at trial, McManus, Jenkins the O.D., and Garcelon the helmsman. I disbelieve McManus, whose entire testimony was completely tainted by his interest in the outcome of these proceedings and was contradicted by other evidence in many instances, whose testimony on this particular point was not corroborated by either of his shipmates who were on the bridge with him, and whose testimony as to the steps he took to identify this light is completely at odds with the careless way he had conducted himself throughout the mission. I believe the testimony of Garcelon, a truthful witness, who was the only member of the crew of the CG-95321 that testified at the trial who is no longer in the Coast Guard.

I find that when Jenkins saw the light from the port bridge he called to Garcelon, who glanced at the radar screen, saw something, and responded, "Yes, you have a target here on radar." Jenkins went into the pilot house, looked at the radar and saw a pip which he interpreted as a buoy and which appeared to be on the same general bearing as the light. Without checking the chart or the light list to determine the characteristics of the Great Round Shoals buoy light, Jenkins then called McManus and reported that he had sighted the buoy. He ordered Garcelon to come left on the light but countermanded the order almost immediately when he noticed that the BARBARA AND GAIL was hung out to starboard and was not coming around with the CG-95321.

McManus arrived in the pilot house about two or three minutes after he had been awakened. He spoke with Jenkins, who informed him of the light and the target on the radar, and looked through the windows of the pilot

house at the light. Even though McManus by his own admission had been through Great Round Shoals channel at night only a couple of times, his entire conversation with Jenkins and his observation of the light took between 30 seconds and one minute. He did not consult his chart to determine the characteristics of the Great Round Shoals buoy light. He did not consult the light list which is specifically designed as an aid in the identification of navigational lights, and which gives detailed information about the characteristics of lights that is not available on charts. He did not time the light with a stop-watch, an accepted method of identifying lights which is usually conclusive when doubt exists. He did not check his radar. He did not determine his position by any means, even though he had taken only one position fix in the last five hours. He did not ask the BARBARA AND GAIL to use her loran to determine their position. He did not inform the BARBARA AND GAIL that a light had been sighted, thereby forfeiting the benefits of Captain Kent's 33 years experience in these waters. He did not turn on his fathometer. He did not order the use of lead lines. He did not post a lookout with no other duties that would interfere with his duties as lookout. Instead, sending Garcelon below for fruit juice, McManus took the helm, turned straight toward the light, and with the BARBARA AND GAIL in tow steamed at 10 knots right onto Nantucket Shoals.

McManus, of course, thought he was heading for Great Round Shoals buoy, a Lighted Whistle Buoy, whose characteristics are a short-long flashing white light. This sort of characteristic has only one meaning, for it is found exclusively on a mid-channel or fairway buoy and on nothing else. The characteristics are a short flash of 0.4 seconds, a dark period of 0.4 seconds, and a long flash of 1.6 seconds, signaling the letter A in Morse Code. The characteristic short-long flash was repeated eight times

per minute. Its 400 candlepower light was 16 feet above the water and in good visibility could be seen for a distance of nine miles. The principal navigational light in the vicinity is Sankaty Head Light on the east end of Nantucket Island. This is a major lighthouse whose light is 1,100,000 candlepower, 166 feet above the water, and 70 feet above the ground. In good visibility it can be seen for a distance of 19 miles. Its characteristic is a one-second white flash every 15 seconds. During certain atmospheric conditions, mostly when there is an easterly storm and there is a mist or dampness in the air, Sankaty Head sometimes seems to have a refraction which looks as if it is flashing twice. The flashing, however, is much bigger and brighter than the one at Great Round Shoals buoy. Furthermore, the flashes seem to be practically the same length rather than short-long and are not repeated as many times per minute as those of the Great Round Shoals buoy.

I find that the light observed by those on the CG-95321 was Sankaty Head Lighthouse, not Great Round Shoals Buoy. I find that the characteristics displayed by Sankaty Head that evening were substantially different from the characteristics of the Great Round Shoals buoy and that the light could have been properly identified as Sankaty Head if those aboard the CG-95321 had used proper seamanship. Specifically, I find that McManus and Jenkins were negligent in failing to properly identify the Sankaty Head Lighthouse. Since they were expecting to see the light of the Great Round Shoals buoy at about the time they sighted this light, they failed to observe the light for a sufficiently long period to enable them to accurately determine its characteristics and check its identity, and blithely assuming it was the light on the buoy they simply turned toward it without taking the most rudimentary precautions required by good seamanship for identifying navigational lights. Their observation of the light con-

sisted of little more than fleeting glances to determine that it was indeed a flashing light. They did not time the light with a stopwatch. The Government took the position at trial that a short-long flashing light was meant to be identified by its characteristics and that timing of the light was not important to identification. The inconsistency of this position of the Government appears from the fact that McManus himself testified on deposition that the light was finally identified as Sankaty Head AFTER the BARBARA AND GAIL had gone aground by "timing the light with a stopwatch."

Moreover, an excerpt from the transcript of a portion of Capt. Kent's testimony at the Coast Guard hearing (Govt. Ex. 79) contains questions by Lt. Commander Bruce regarding the characteristics of the Sankaty Head Light. When Capt. Kent informed Commander Bruce that Sankaty Head Light sometimes had a refraction which makes it look as though it is flashing twice, the Lieutenant Commander asked Kent, "Have you had occasion to check the timing of the characteristics or just similarity in appearance as you describe it?"

Dutton's "Navigation and Piloting," a recognized authority on proper seamanship, which McManus had used in school and aboard the BARATARIA and a copy of which was in the pilot house of the CG-95321, makes it clear that timing of lights is an important step to be taken in order to identify a light. I find that Sankaty Head Light could have been properly identified if McManus or anyone acting under his command had timed it with a stopwatch.

During the time the BARBARA AND GAIL was under tow her engine was shut down, her wheel secured by a becket, and she was in effect under the navigational control of the CG-95321. While there is some conflict in the testimony as to the instructions given by Capt. Kent to Clarence Roberts who was standing watch when the grounding oc-

curred, I find that Roberts understood his instructions to be to call Capt. Kent if he saw the fathometer reading go below 10 fathoms or if he observed anything unusual. Roberts was an ordinary fisherman, not shown to be qualified or experienced in navigation, and I find that during the period he was standing watch he in fact observed nothing unusual, save a slackening of the towline. He roused Capt. Kent when the slack towline was discovered but by the time Kent got on deck the line had become taut again and Kent returned to his quarters. I find that Capt. Kent did not see the light toward which the CG-95321 had turned shortly before the line went slack. Although Roberts did see the light at some time prior to the grounding, being untrained in navigation he did not understand its significance and did not consider seeing a light unusual. I find no negligence in the fact that he did not report sighting the light to Capt. Kent, since Roberts reasonably was under the misguided impression that the crew of the CG-95321 were navigating a proper course to New Bedford.

After making its turn the CG-95321 steamed toward the light for 10 or 15 minutes. Garcelon returned to the pilot house with the fruit juice, cups, and ice cubes, followed by Bryant, the engineer, who came up just to get some juice. While standing on the port wing putting some ice cubes into his cup, Bryant saw breakers off the port bow. He poked his head into the pilot house and said, "What is this white water out here?" McManus responded, "That is what I would like to know." McManus tried to turn to port but could not bring the ship around and the CG-95321 was swept over the shoals without grounding. The BARBARA AND GAIL, however, was towed onto the shoals and ran aground. The CG-95321 cut the towline and maneuvered as close to the BARBARA AND GAIL as she could safely go, a distance at the closest of about 150 feet. Kent informed McManus that the BARBARA AND GAIL was hard aground

and taking water fore and aft. Kent also said that he was preparing a keg and line so that if it became necessary to leave the ship his men would all be together on the line.

While these arrangements were being made aboard the BARBARA AND GAIL, the CG-95321 was frantically trying to find out where she was. Her first report of the grounding, apparently a radio-telephone message sent minutes after the grounding, reported the fishing vessel aground on Great Round Shoals. This message was forwarded to the RCC but for some unexplained reason no action was taken by RCC. About 35 minutes later, McManus sent a message reporting the fishing vessel aground at Pollock Rip (pt. J on Govt. Ex. 57), a position about five miles away from the area where the sinking actually occurred. This message got some action from RCC which immediately dispatched a message requesting information as to the condition of the fishing vessel and the assistance needed by the CG-95321. McManus answered with a message received by RCC at 2:39 informing them that the fishing vessel had sunk at 2:01 a.m., that the CG-95321 was picking up survivors, and that no assistance was needed at present.

Charts were offered in evidence on which were plotted several different positions calculated by the Coast Guard to be the place at which the BARBARA AND GAIL grounded. These positions appear on Govt. Ex. 64 as positions I, J and L. I find that the site of the grounding and sinking of the BARBARA AND GAIL was on Rose and Crown Shoals in the general vicinity of and somewhere in between positions I and L, probably nearer to position I than to position L, and that the exact site of the grounding to this day has not been accurately ascertained. In any event, the sinking was in the order of 6 to 7 miles south of the Great Round Shoals buoy, the location at which McManus erroneously believed the CG-95321 to be. It should be noted that position J, the first point which the crew of

the CG-95321 calculated to be the scene of the disaster, is 10½ miles south of the Great Round Shoals buoy.

Just before the BARBARA AND GAIL sank, the crew, wearing life jackets, was assembled on the forward deck, where the keg and line had been prepared, and had been informed by Capt. Kent of the procedure to be followed when abandoning the ship. Capt. Kent returned to the pilot house for a pair of swim fins because he thought they would give him greater mobility and control of the direction of the line and keg with his men on it when they were in the water. As he was returning from the pilot house he stopped to put on the fins and as he did so, "the boat went out from under me." The BARBARA AND GAIL suddenly slid off the shoal and sank within seconds at 2:01 a.m. on December 19, 1961. As a result none of her crew was able to get on the line which had been prepared. The CG-95321 picked up, before 3:00 a.m., the five crew members of the BARBARA AND GAIL who survived this disaster. Clarence Roberts was rescued through the personal heroism of Jenkins who dove into the frigid December water without a life jacket and pulled him out. Some time shortly after 4:00 a.m. a Coast Guard plane arrived on the scene and dropped flares to illuminate the area, something that had not been done by the CG-95321 although she had flares aboard. The CG-95321 recovered three bodies later in the morning. Two bodies were never recovered. The CG-95321 returned to port with the five survivors and three bodies later that day.

The Government urges several theories seeking to escape liability for this tragedy. It first argues that it is immune from suits arising out of rescue operations on the Coast Guard because there is no relationship in the realm of private vessels comparable with that existing between a vessel in distress and a Coast Guard vessel which gratu-

itously comes to her rescue, citing *P. Dougherty Co.* v. *United States*, 207 F.2d 626 (3d Cir. 1953).

Under the Public Vessels Act, which by reference incorporates the Suits in Admiralty Act, 46 U.S.C.A. 741-752, the United States relinquished its sovereign immunity and consented to be sued according to the principles of law obtaining in like cases between private parties for damage caused by a public vessel of the United States. *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215 (1945). Whatever persuasive effect the *Dougherty* decision had in the face of the forceful and well-reasoned dissenting opinion of Chief Judge Biggs has been completely eliminated by the rationale of subsequent decisions of the Supreme Court interpreting the Federal Tort Claims Act, particularly those in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955) and *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957), which make it abundantly clear that the United States is now liable for its negligent torts in areas where it once could avail itself of the shield of sovereign immunity to avoid answering for its wrongdoing. See also *Eastern Transportation Co.* v. *United States*, 272 U.S. 675 (1927), cited in Fn. 2 of *Indian Towing*. It is significant for purposes of the instant case that in the course of his analysis of the Government's liability in the *Indian Towing Co.* case, Mr. Justice Frankfurter noted (at p. 67) and reaffirmed the fact that the Government had tried but failed to escape liability under the Suits in Admiralty Act, for negligent performance of a so-called "purely governmental function" in the *Eastern Transportation* case decided back in 1927.

The Government next argues that its obligation in a case of attempted rescue by the Coast Guard is in no event greater than that of a private salvor and that accordingly its conduct should be measured by the legal standard of the so-called Good Samaritan doctrine, citing

Frank v. *United States,* 230 F.2d 178 (3d Cir. 1957) and *Petition of United States,* 216 F. Supp. 775 (D. Ore. 1963). Under its interpretation of this doctrine the Government contends that the Coast Guard has no duty to provide a seaworthy vessel to answer a request for assistance, nor even to provide one with equipment in good working order, but that those unfortunate mariners who become in need of assistance must take as they find her whatever vessel the Coast Guard deigns to send to their assistance.

The Government closes its eyes to reality when it persists in considering the Coast Guard's rescue operations as the equivalent of the situation in which one private vessel goes to the aid of another. Today and for some years past, the United States Coast Guard has carried out a search and rescue operation on a grand scale, which it is authorized to do by the statute, 14 U.S.C.A. 88a(1), b, and which it is directed to do by the National Search and Rescue Plan promulgated in March 1956 by the President's Air Coordinating Committee. See *United States* v. *Gavagan,* 280 F.2d 319, 322 (5th Cir. 1960). The nature and extent of these activities are widely publicized through the public relations offices of the Coast Guard and other participating branches of the military service. The availability, and the usual excellence, of the search and rescue service and the fact that many mariners have been saved over the years by heroic action of the Coast Guard, Navy and Air Force are such matters of common knowldege as to be a proper subject for judicial notice. As a result of the holding out of the availability of this search and rescue service and the extensive publicity which it has received over the years, mariners, commercial fishermen, yachtsmen and pleasure boaters, indeed all those who go down to the sea in ships, have been induced to rely on this usually excellent search and rescue service rather than seek assistance from private sources. The instant

case is but one example of this reliance. Disabled because rudderless, but in no immediate danger, the BARBARA AND GAIL, which merely needed a tow to land, turned to the Coast Guard for assistance rather than call upon a fellow fisherman. On the other side of the coin, those fishermen and mariners who, true to the tradition of seafarers would otherwise go to the aid of vessels in distress or in need of assistance, now rely on the Coast Guard to do so. For example in the case of *Trawler Frank C., Inc.* v. *United States*, In Admiralty No. 63-65-C, D. Mass. Dec. 22, 1965, decided by this Court, even though four fishing vessels were fishing off a common float they called for Coast Guard help and let the Coast Guard take over both the firefighting on and the towing of the disabled fishing boat.

To paraphrase *Indian Towing Co.* (at p. 65), even assuming that the Coast Guard need not have undertaken the search and rescue service, once it exercised its discretion to operate a search and rescue organization and engendered reliance on the competent assistance usually afforded by the vessels engaged therein, it was obligated to use due care to make certain that the vessels were kept in good working order; and, if the vessels were unfit for the job, then the Coast Guard was further obligated to use due care to discover this fact and to repair them or give warning that they were unfit. If the Coast Guard failed in its duty and damage was thereby caused to claimants, the United States is liable. I rule that the Coast Guard was under a legal duty to send out on this assistance mission a properly equipped vessel, manned by a competent crew, or else to inform the BARBARA AND GAIL that the Coast Guard did not have available a ship reasonably fit for the intended assistance mission or a captain and crew reasonably qualified to perform the assistance mission, and that the Coast Guard negligently breached these obligations.

I find that the Coast Guard assigned to this mission a vessel equipped with a defective loran, a defective gyro compass and repeater, a defective fathometer, and a totally inoperative radio direction finder. I find that McManus, who under the Coast Guard's chain of command was the officer responsible for deciding the vessel's capability of performing the mission, knew of all these defects and was negligent in not reporting to Coast Guard headquarters that the vessel was incapable of performing the mission due to this mass of defective gear and in nevertheless undertaking the mission; and that the BARBARA AND GAIL was never informed that the CG-95321 was navigating with all this defective equipment.

I find that McManus violated the Coast Guard's duty to use ordinary care in performing this mission by delaying unduly in reporting to First Coast Guard District headquarters that the hawser had parted, by electing to try to run the northerly route back to New Bedford instead of taking the slightly longer but much more shoal-free southern route, by relying on his defective equipment and assuming that he got accurate bearings therefrom, by telling Headquarters that he did not need relief, by failing to obtain the use of the loran and other navigational equipment on the BARBARA AND GAIL, by failing to identify Sankaty Head light as such, and by mistaking it for the Great Round Shoals buoy light. I rule that these negligent acts and omissions were proximate causes of the disaster which befell the crew of the BARBARA AND GAIL, including the loss of five lives.

The Government also contends that it is entitled to escape responsibility in this case because there has been no affirmative showing that the BARBARA AND GAIL was deprived of any available assistance from some other source because of misplaced reliance on the services of the CG-95321, an allegedly essential element of a cause

of action against the United States. I rule that claimants have no such burden of proof and that the Coast Guard is liable for damages caused by its negligence to any mariners who in fact have relied on the availability of its search and rescue services. When, as in the instant case, the Coast Guard has failed to use reasonable care in the course of attempting a rescue operation, it will not be heard to say that the unfortunate victims did not rely on the availability of its services.

On the other hand, if a showing is necessary that claimants forewent the services of other available rescuers, the record discloses that the BARBARA AND GAIL had a ship-to-shore radio telephone in good working order, that their call for assistance came from a position near Georges Bank, that at all material times they were on fishing grounds heavily used by the New England fishing fleet, and that Captain Kent has been a member of the New Bedford fishing fleet for some 33 years. On the basis of this record I find that by calling the Coast Guard for assistance the BARBARA AND GAIL passed up the opportunity to call for help from other fishermen in the general area of Georges Bank or from other members of the fishing fleet who were on shore and who certainly would respond to a distress call from a fellow fisherman. The Government's contention, which in effect is that on this record the Coast Guard was the sole rescuer available, is totally untenable, in view of the degree of commercial fishing and other shipping carried on daily off the New England coast and particularly in the area of Georges Bank and off Nantucket Island. It is clear that a call for private help at either 8:00 a.m. on December 18 or at any time before the CG-95321 reestablished the tow would have been early enough to assure the arrival of help in view of my findings as to the probable drift of

the BARBARA AND GAIL and the evidence that sea anchors could have still further slowed down that rate of drift.

Finally, the Government argues that in any event the BARBARA AND GAIL suffered no so-called distinguishable injury, even assuming negligence on the part of the Coast Guard, because the Government claims that if left untowed the BARBARA AND GAIL would have fetched up on Rose and Crown shoals a few hours after the actual grounding because of prevailing winds and currents.

The Government relies on the testimony of Dean F. Bumpus, an oceanographer and an expert on the currents and tides of the Atlantic coastline. The argument is made that the parting of the towline occurred without the fault or negligence of the CG-95321, that had she not then taken the BARBARA AND GAIL back in tow the BARBARA AND GAIL certainly would have gone aground on the Nantucket shoals, that this is what in fact did occur, and therefore that the BARBARA AND GAIL sustained no distinguishable injury. I find to the contrary, that the sinking of the BARBARA AND GAIL was an independent injury caused solely by the negligence of the Coast Guard. The finding that the towline parted due to the negligence of the crew of the CG-95321 undermines the cornerstone of the Government's argument, for, in view of that finding, the critical position of the BARBARA AND GAIL for purposes of applying the distinguishable injury rule is her position when the tow began. From that position, according to Mr. Bumpus, she would have drifted "out through South Channel clear of any shoals." Furthermore, the diagram prepared by Mr. Bumpus showing the course that he calculated the BARBARA AND GAIL would have followed if the CG-95321 had not reattached the towline (Govt. Ex. 78, superimposed on Govt. Ex. 57) was prepared on the false assumption that the BARBARA AND GAIL would have been drifting without any anchor dragging and for that reason is inaccurate. The BARBARA AND GAIL had

three scallop dredges, or drags, on board, each weighing about 1100 or 1200 pounds. There were 200 fathoms of 7/8" steel cable on each drum of the winch. These dredges were often used as anchors while the BARBARA AND GAIL was fishing. A dredge would be attached to the line on the drum, thrown overboard and towed for a while until it filled up with rocks, and then was given some more line so that it served as an effective anchor. I find that Captain Kent would certainly have put a dredge overboard if he were adrift at the 2005 position and that the weight of the dredge would have had a substantial effect on the drift of the BARBARA AND GAIL. I therefore conclude that Govt. Exhibit 78 is based on inaccurate factual data and I am not persuaded that the BARBARA AND GAIL would have fetched up on the shoals if the Coast Guard had not reattached the towline.

Another vice in Govt. Exhibit 78 is the fact that it is based on weather testimony of the crew that is inconsistent with those conditions reported in the log. Earlier in this opinion the crew's testimony has been rejected as untruthful, and a finding has been made that the conditions reported in the log were the actual conditions. Mr. Bumpus prepared a diagram showing the drift of the BARBARA AND GAIL based on the weather data in the log of the CG-95321. According to that exhibit she would have arrived in the vicinity of the Great Round Shoals buoy 24 hours later. She thus would have drifted without grounding for the entire day of the 19th in an area heavily travelled by shipping.

Finally, Govt. Exhibit 78 and Roberts' Exhibit 32 are based on the assumption that the 2005 position is accurate. And this points up the key to this disaster. The evidence is overwhelming that McManus did not know where he was for most of the trip. I find that the 2005 position is inaccruate and for that reason Govt. Exhibit 78 is inaccurate.

I rule that this case involves a distinguishable injury caused by the negligence of the Coast Guard and that the governmental contention that no distinguishable injury is involved herein is totally devoid of factual foundation on this record, being predicated on the opinion of Mr. Bumpus which, in turn, is bottomed on a series of assumptions which in the course of this opinion I have ruled to be non-factual, and I find that the sole cause of the sinking of the BARBARA AND GAIL was the negligence of the Coast Guard.

As a corollary thereto, I rule that the Government's contention that this disaster was caused either in part or in whole by the contributory negligence of the captain and crew of the BARBARA AND GAIL is also without factual foundation. I find that during the course of the tow, those aboard the BARBARA AND GAIL relied on the navigational ability of the CG-95321 and that, though this reliance turned out to be misplaced, it was reasonable under the circumstances then prevailing. I likewise rule that there was no negligence on the part of the captain or crew of the BARBARA AND GAIL after her grounding and sinking.

In *Cornell* v. *Phipps,* 317 U.S. 485 (1942), the Supreme Court restated the principle which is to be applied in determining a petition for limitation or exoneration filed by a corporate shipowner, saying at p. 410:

> "In those cases it is held that liability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent, whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred."

In the instant case, Capt. John M. Waters, Jr., presently Chief, Search and Rescue Division, United States Coast Guard, Washington, D. C., who, on December 18, 1961, held

the rank of Commander and was Staff Search and Rescue Officer, First Coast Guard District, testified that on December 18, 1961 nothing had been brought to the attention of the Boston Search and Rescue headquarters to give that headquarters any reason to believe that the CG-95321 was incapable of performing search and rescue missions. Capt. Waters further testified that there was no Coast Guard regulation on December 18, 1961 which required the commanding officer of any Coast Guard vessel to furnish such information to Search and Rescue headquarters. He conceded, however, that subsequent to this tragedy such an order was promulgated. Captain Waters further testified that there was in effect "a general prudential rule" that regardless of a unit's status for patrol assignment, should a case arise which in the opinion of the commanding officer is beyond the unit's capabilities he shall immediately advise the Commander, First Coast Guard District. I find that as of December 18, 1961 the Coast Guard in effect had made the commanding officer of each vessel the sole judge of the capability of that vessel to perform an assigned mission.

The scope of the authority and responsibility of Lt. McManus, and the extent to which the Coast Guard vested in him complete responsibility for making decisions pertaining to this mission, are further established by the testimony of Captain Waters as to the decision to cancel the sailing orders of the FREDERICK LEE, "The commanding officer on the seas is in the best position to know what his situation was . . . we felt he was in the best position to know what was happening there." Neither Waters nor anyone else at Search and Rescue headquarters exercised any independent judgment whatever in making this decision, but instead relied solely on McManus' judgment that he required no further assistance, despite the fact that they had available to them at that time weather information indicating that the CG-95321 was then operating in conditions

which according to the guidelines set up by Search and Rescue (Govt. Ex. 2) indicated that it could not "operate at maximum efficiency . . . and its safety might even be jeopardized under such adverse sea conditions," and despite the fact that larger vessels were available. In view of the information available to him Waters was negligent in abdicating his responsibilities and rubber-stamping the decisions of the inexperienced immature McManus.

I rule that because of his position as Staff Research and Rescue Officer, First Coast Guard District, Waters was an "executive officer, manager or superintendent whose scope of authority included supervision over the phase of the business out of which the loss or injury occurred," and that his knowledge is chargeable to his principal, the United States. And I further rule that under the method of procedure and division of responsibility followed by the Coast Guard, McManus also was an "executive officer, manager or superintendent whose scope of authority included supervision over the phase of the (Coast Guard's) business out of which the loss or injury occurred," and, therefore, that the United States is not entitled to limitation of liability.

The petition for exoneration from or limitation of liability is denied and the case will stand for the assessment of damages.

(s) ANDREW A. CAFFREY
U. S. District Judge

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
IN THE MATTER OF PETITION OF
THE UNITED STATES OF AMERICA,
AS OWNER OF THE UNITED STATES
COAST GUARD VESSEL CG-95321,
FOR EXONERATION FROM OR LIMITATION OF LIABILITY.
IN ADMIRALTY No. 63-27-C

DECREE

June 30, 1966

In conformity with Opinion of the Court filed this date, it is

ORDERED:

The petition of the United States for exoneration from or limitation of liability is denied.

By the Court,
(s) WILLIAM J. LYONS
Deputy Chief

(s) ANDREW A. CAFFREY
U. S. District Judge

Appendix C

United States Court of Appeals

For the First Circuit

No. 6772.

UNITED STATES OF AMERICA,

PETITIONER, APPELLANT,

v.

SANDRA & DENNIS FISHING CORP. ET AL.,

CLAIMANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

William E. Gwatkin, III, Attorney, Department of Justice, with whom *J. William Doolittle*, Acting Assistant Attorney General, *Paul F. Markham*, United States Attorney, and *Morton Hollander*, Attorney, Department of Justice, were on brief, for appellant.

Morris D. Katz, with whom *Harry Kisloff* and *George J. Dodd* were on brief, for Eleanore T. McCarthy, Administratrix, et al., appellees.

John O. Parker, with whom *Ely, Bartlett, Brown & Proctor* was on brief, for Sandra & Dennis Fishing Corp., appellee.

January 26, 1967.

ALDRICH, *Chief Judge*. At 0750 on the morning[1] of December 18, 1961, the Coast Guard Rescue Coordination Center in Boston received a call from the fishing vessel Barbara and Gail (hereinafter B & G) giving a position about 52 miles southeasterly of the Great Round Shoal entrance to Nantucket Sound and stating that she had lost her rudder; that the weather was good, and that she was in no immediate danger, but that she wanted to be towed

[1] We will follow the Coast Guard 24-hour system of designating hours and minutes.

to her home port of New Bedford. The Center dispatched the Coast Guard patrol boat CG-95321 (hereinafter the 95) for the mission. Seventeen hours later the 95 had towed the B & G onto the Rose and Crown, an extensive shoal ten miles east of Nantucket, after experiencing unexpectedly heavy weather and a number of misfortunes. We use the benign word "misfortunes." To what extent they were faults were the principal factual issues in the case. The B & G and five members of her crew were lost. The government brought a petition for exoneration or for limitation, and for a declaration of fault on behalf of the B & G. After a seven-day trial the district court denied all three requests in an extensive opinion reported in 255 F.Supp. 737, and the government takes this interlocutory appeal. A number of questions of law are raised, but their application requires us to make first a detailed examination of the factual findings.

The 95 was 95 feet long, and drew 4 feet forward and 6 feet aft. Her cruising speed was 17 knots. She was equipped for towing. The B & G was an apparently conventional scalloper, 90 feet long and with a maximum draft of 10 feet. The 95 was under the command of Lt. (jg.) McManus; the B & G of S. S. Kent, the president and principal stockholder of her corporate owner, Sandra and Dennis Fishing Corp., a claimant herein. The other claimants are the members of the crew or their legal representatives. The officer in charge of the Center, who authorized the dispatch of the 95, and who was admittedly a managing officer in the limitation of liability sense, was Commander Waters.

The 95, temporarily stationed at Woods Hole, was the only immediately available Coast Guard vessel. She was on ready status, as against a larger and much slower vessel, the Frederick Lee, which was on six hours availability. At sea was the still larger Barataria, assigned to

Texas Tower No. 2. The court did not criticize the Center for not ordering out the Lee or detaching the Barataria, and we believe quite correctly so. At the same time, because of her light draft, the 95 was not a heavy weather vessel, and if heavy weather had been expected there might have been more of a question as to the advisability of dispatching her. In point of fact the unexpected weather did not seriously impair her performance. The strand was occasioned not by the weather, but by the navigational procedures of her commanding officer.

Leaving Woods Hole at 0820 the 95 proceeded through the Sound and passed the Great Round Shoal lighted fairway buoy (hereinafter the GRS buoy) at 1124. Thereafter she encountered increasing winds and seas and twice reduced her speed. She picked up the B & G on her radar at 4 to 5 miles without difficulty and reached her at 1545. At 1600 the tow was under way and McManus radioed his loran position to the Center. He set a course back to the GRS buoy and proceeded thereon until 1800 when the towing hawser parted. The by-then-heavy seas and wind, plus the fact that the line had parted at the 95's end and so had to be recovered from the B & G, created great difficulties in reestablishing the tow. At 2035, having become apprehensive that the connection could not be effected at all, McManus radioed for assistance. Commander Waters thereupon instructed the Frederick Lee to get ready and assigned her to the mission. He concluded, because of the weather conditions, that it would be preferable for the 95 to desist in her attempts to reestablish the tow. Kent, however, was apprehensive lest they drift down on some part of Nantucket Shoals, and upon his urging the hawser was finally passed. Just as Waters was about to send a message to desist he received word that the tow was proceeding satisfactorily, and that relief was no longer needed. Waters thereupon ordered the Lee to discontinue.

Because of the strain upon the B & G's stem occasioned by the heavy weather Kent requested to be towed as slowly as possible and more to windward. They proceeded variously until 2300, when Kent agreed that they might resume their regular course. At this point McManus determined that the GRS buoy bore 292°. He estimated an allowance for current and drift and proceeded at 300°.[2] At midnight he instructed the crew in the pilot house that he was going below for an hour, by which time the GRS buoy should be on their port hand. He requested to be called as soon as the buoy was seen, and, in any event, at 0100.

At about 0100 a double flashing light was observed some 40° off the port bow. Jenkins, who was in charge, used the radar and discovered a pip, or target, which appeared to be a buoy, and which the court found was "on the same general bearing as the light." Jenkins concluded that the light was the GRS buoy, whose characteristic was a short-long (double) flash. He accordingly called McManus. McManus looked at the double flash and believing, too, that it was the buoy, ordered the course changed to head directly for it. Some twenty minutes later white water, which indicated a shoal, was observed two boat-lengths ahead. McManus endeavored to take evasive action, but with the wind and seas behind him, was unsuccessful. The 95 was carried over the shoal, dragging the B & G after her. Because of her greater draft, the B & G struck, and remained fast.

At first no one knew where they were. McManus sent a call for help, giving a wrong location, but shortly determined that they were somewhere on the Rose and Crown, some 6 or 7 miles from the GRS buoy. The light which, because of conceded distortion, had appeared to

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[2] The court did not discuss the propriety of this allowance, but the record affords full data for checking, and indicates that it was reasonable.

have a double flash, and had led them onto the shoal, now appeared more clearly and was seen to be flashing only once instead of twice. Rather than a buoy, it was Sankaty Head Light, some 11 miles away. By a most unfortunate coincidence, the radar target on the same bearing, to which they had attributed the light, was the Rose and Crown unlighted buoy. (The radar showed the substance without the light; the eye showed the light without the substance.)

Meanwhile, from the B & G, which had lost her small boats, Kent informed McManus that if it became necessary to abandon ship he would have his men tied onto a line, to be buoyed by a keg, so that they could be picked up downwind. For reasons not clear to us Kent's men were still waiting for such instructions when the B & G was suddenly swept off the shoal and immediately sank. Kent and five men, though swimming free, were rescued, but five others were not seen.

In placing unlimited blame upon the government the court criticized the 95, her personnel, and Commander Waters in many particulars, making a number of findings unfavorable to the government. We list the major ones in the order of their first appearance. All of these, with one exception, the court held to be "negligent acts and omissions [that] were proximate causes of the disaster." For some, footnote comment will suffice; the rest we will deal with at greater length.

1. Radio direction finder inoperable.[3]

[3] The RDF went out Saturday afternoon, December 16. There is no evidence that this type of device, originated long before the advent of the loran, is of such accuracy that it would have been of any special value in this case had it been operable. We find no evidence of negligence, and nothing in the record to support the court's finding that lack of this equipment was a proximate cause of the strand. If, however, we are misled by claimants' failure to introduce evidence on this score, the discussions and conclusions, *infra*, with relation to the defective loran are equally applicable here.

2. Fathometer seriously defective and hand lead not used.[4]

3. Gyro compass had 3° error, and magnetic compass not used.

4. Loran inaccurate and unreliable.

5. Towline parted because of negligence.[5]

6. The 2250 loran position was erroneous.

7. Wrong to cancel request for relief after B & G back in tow.[6]

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[4] The court's finding is well grounded. However, there are no subsidiary findings supporting the conclusion that failure to take soundings contributed to the loss, or any testimony on which such could be based. On the contrary, the claimants' evidence was to the effect that they kept watch on their own fathometer in order to be warned if the water shoaled below ten fathoms, and that it never did so until the point of the strand. While we confess that examination of the chart makes this testimony questionable, the court apparently accepted it, and claimants say in their brief, "There are gullies on Nantucket shoals so that the Barbara and Gail did not necessarily pass over less than ten fathoms." Under these circumstances we will not try to work out a basis of liability for which none of the parties contends. At the same time we might add that if it should have been found that the vessels passed through shoal water prior to the strand, we would have to conclude that Captain Kent's undertaking was, in fact, the B & G's minimum obligation of due care, and that failure to perform it was substantial contributory fault. See discussion of contributory negligence, *infra*.

[5] The court did not find that the parting of the hawser was a proximate cause of the strand, but negligence in this respect is so serious a charge against the Coast Guard that we will briefly deal with it. The court's conclusion, rejecting the opinion of a government expert that the break was due to an inherent defect in the rope, was based upon a finding that the hawser was so fastened that the chafing gear, a canvass parcelling, was not in contact with the taffrail, with consequent wearing of the fibre. We believe that photographs introduced by the claimants, and stipulated to be of the broken line, conclusively demonstrate that the court resolved the testimony erroneously, and that the break occurred not off, but near the center of the parcelling. On this basis the finding of negligence is unsupported. We do not criticize the district court for this. Even on appeal counsel failed to point out the significance of the photographs, which show, however, that the parcelling had extended over both sides of the break.

[6] The court does not explain the basis for this finding. At the time that McManus cancelled the request, the 95 had the B & G in tow,

8. Loran broke down at 2345; McManus negligently failed to ask B & G for loran position.

9. Negligent misidentification of light.[7]

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and was proceeding satisfactorily. Kent not only had requested that the tow be reinstated, but had expressly approved the general direction and the speed they were making. The court said that it was regrettable that Waters cancelled the relief, but it did not find, and it could not be suggested, that the vessels should have stayed where they were and marked time for the ten or so hours it would have taken the Lee to reach them. On the basis of the tow continuing it could not have made any difference whether the relief was cancelled or not; the strand would have occurred long before contact could have been achieved.

[7] The government makes a very persuasive argument, based on the fact that Sankaty Head light in mist with an easterly wind sometimes appeared from a distance as having a double flash rather than a single one, as Kent himself admitted, and on the further fact that there were no true double-flashing lights anywhere in the area except the GRS buoy, that the court erred in finding the misidentification to have been negligent. We agree with the government that the court put too much faith in the testimony of Captain Kent in his deposition as distinguished from his prior testimony at the Coast Guard hearing. On the later occasion, obviously recognizing the difficulty he had caused himself earlier, Kent repeatedly introduced qualifications that, in our opinion, were totally contradictory to what he had said previously. In his original statement Kent testified that "atmospheric conditions at times changed the looks of the light so at times *one light looks the same as the other light.* . . . the similarity in appearance has been — I've come in and out of there so many times that it's just when I see one, *even though they both look the same*, why they look different to me, so that's how I distinguish them now." (Ital. suppl.) Certainly, this "difference" could not be more clearly indicated as a "feel," appreciable only by one having particular experience. Yet in his subsequent deposition Kent testified that while Sankaty Head light appeared to flash twice, "the flashing was so much bigger . . . one light was brighter than the other light." The court accepted this new testimony and found that Sankaty Head appeared "substantially different" from a buoy. We prefer Kent's first testimony, not only because it is less suspect, but because we regard his explanation as physically implausible. The visibility of a light to the human eye must depend upon the luminosity that reaches the point of the observer. It seems to us obvious that as to any two lights, irrespective of their initial brightness, the luminosity at the utmost distance of visibility, or threshold, to the human eye must be the same. If it were brighter, it would have been seen sooner, *i.e.*, further away. We must reject Kent's attempt to explain away his previous statement.

10. Negligent failure to check identification of light.[8]

11. Coast Guard negligent in sending out improperly equipped vessel, or

12. in failing to inform B & G that the 95 was improperly equipped and improperly manned.[9]

13. Negligent delay in notifying the Center that hawser had parted.[10]

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[8] We need not pursue this matter, nor the companion question of whether in the original identification McManus was negligent. We may say, in all fairness to McManus, that it is difficult for us to believe, even operating a Monday morning slide rule, see *Page* v. *United States*, E.D. La., 1952, 105 F.Supp. 99, 102, that where the 95 was looking for a buoy with two flashes in an area where nothing else was supposed to show two flashes, and found a buoy and a corresponding double flashing light in the area in which they were expecting to see one, it was negligent not to put a stop watch on the buoy and find it was flashing somewhat less frequently than it should have been. No one testified, and none of the extensive printed material introduced in evidence indicated that it is customary to clock buoys. We think that the Coast Guard's asking Kent whether he did so (and receiving a negative answer) was not an admission that it should have been done, but, if anything, the reverse. However, even if it could be thought that McManus was imprudent with respect to his conclusion that the light was the GRS buoy, negligence in this regard is irrelevant. Or, rather, lack of negligence in this regard would not make any difference in the result. If the loran positioning, as the court properly found, was wrong and negligently arrived at, any mistaken identification of the light was but a consequence of McManus' negligence in not having previously discovered that he was substantially off course. Accordingly, that prior negligence remained an active, producing cause of the strand.

[9] There is at least a suggestion in the court's opinion that the 95 was improperly manned. We find no specific findings with respect to the crew, except as to the chafing gear. We believe this criticism, if made, was misplaced. See also fn. 5, *supra*. As to McManus, the fact that the court quite correctly found that he made an error did not mean that from the Coast Guard's standpoint, at least prior to this accident, he was unqualified to command. A detailed inspection report of the previous summer was reservedly commendatory of his ability. The matter of improper equipment we consider elsewhere.

[10] When the towing hawser first parted there was no expectation that contact could not be reestablished. We do not think that McManus was required to report his difficulties until their seriousness became apparent. Furthermore, causation is totally lacking. If McManus had

14. Negligent in taking route north of Nantucket.[11]

15. Negligent in relying on defective equipment.

16. Waters was negligent in accepting McManus' recommendation to cancel relief after the B & G was back in tow.

The findings not disposed of in the footnotes fall into three categories, deficiencies in equipment, deficiencies in navigation, and acts and omissions to be considered on the issue of limitation. Before discussing these findings, however, we first consider the extent of the obligation that the Coast Guard owed the claimants. We think it clear that the applicable statutes, 46 U.S.C. §§ 741-52, 781-90, do not amount to a general undertaking by the United States to provide rescue service on demand. See *Lacey* v. *United States*, D.Mass., 1951, 98 F.Supp. 219. The case of *Indian Towing Co., Inc.* v. *United States*, 1955, 350 U.S. 61, upon which claimants place principal reliance, did not impose liability upon the government because the Coast Guard maintained insufficient equipment—there navigational aids—per se, but because it failed to maintain a particular aid after the plaintiff had been led to believe it could rely on it. How much equipment the Coast Guard is to possess, and how much money it is to spend, measured, necessarily, by Congressional appropriations, must be for the government's uncontrolled discretion. We can recognize no obligation upon the government either to have had

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requested relief at the moment of the break, his relief was the Frederick Lee, which could not have reached the scene in time to prevent the strand. See fn. 6, *supra*.

[11] There was no testimony supporting this finding. In addition, although Kent denied that he knew McManus proposed to use the northern route, members of his crew contradicted him, and the facts themselves contradict him. Kent was an experienced navigator. He knew where he was, and he knew from his compass which way they were proceeding. Kent made several requests during the tow by his radio telephone, all of which McManus acceded to. It is inconceivable that he did not know where they were going, and would not have complained if there had been any reason for taking a different route.

the 95 available, or to have had on board any particular equipment. *Frank* v. *United States*, 3 Cir., 1957, 250 F.2d 178, *cert. den.* 356 U.S. 962; *Petition of United States*, D. Ore., 1963, 216 F.Supp. 775, 781.

What we do recognize is precisely in accord with the principle laid down in *Indian Towing*, namely, that the government must not mislead, and must not induce reliance upon a belief that it is providing something which, in fact, it is not providing. We think the first ruling by the district court, that the Coast Guard "was obligated to use due care to make certain that the vessels were kept in good working order" was excessive, but that its alternative ruling, "or give warning that they were unfit," 255 F. Supp. at 749, was exactly correct. By its silence when it accepted the mission it must be found that the Coast Guard led the B & G to believe that the 95 was reasonably capable of performing the task.[12] This would include a representation that she was competently manned, or, to put it another way, the silence was an undertaking that the crew of the 95 would perform its functions with reasonable care.

Commander Waters testified, and, as will be developed, we find nothing to impeach or to contradict his opinion,[13] that an inaccurate gyro was of no consequence if the magnetic compass was correct. He further stated that "we have navigated many years without loran," and that the mission "could have been carried out with her loran out, in the conditions existing at the time this mission originated, which were moderate weather and good visi-

[12] We emphasize that this was not a warranty in the sense that a "representation" of seaworthiness has been suggested to be made to a seaman.

[13] It may be noted that such cross-examination as there was proceeded upon false assumptions that the magnetic as well as the gyro compass was out and that the radar was impaired.

bility.'"[14] The record conclusively shows that he was correct, and that the fault, and the eventual miscarriage, was due basically to human error and not to inadequate equipment.

So far as the gyro compass is concerned, it had been installed two months before. It had shown various errors from time to time, and was still officially "under evaluation." The court found that on December 18 it had a 3° westerly error. The government witnesses denied this, but the pertinent pages of the verification log in which any checking with the magnetic compass is recorded unaccountably disappeared before trial. We could not say that the court's disbelief of the government witnesses under all the circumstances was plainly wrong. We do say, however, that the claimants take nothing from the fact that the gyro was inaccurate. The sole fault, accepting the court's findings, was in the failure to maintain the customary verification with the magnetic.

We need not consider the gyro further, however, because it is overshadowed by the loran. A 3° steering error produces a deviation of only 5%. Had the loran been accurate, the 95 would have had a correct fix at 2250, and would thereafter have traveled off course, as a result of a 3° error, less than a mile. Had McManus checked with the B & G's loran at 2345, the departure would have been half a mile. We turn, therefore, to the subject of the loran.

It would serve no purpose to describe all the past troubles the 95 had had with her loran. Sometimes, in spite of repairs, the log showed, "not operating properly," sometimes, not operating at all. We assume that at other

[14] He might have added that another condition was that the B & G was known to have an available loran. While we are not of the Mary Roberts Rinehart "Oh-if-she-had-only-known" school, it is clear that had McManus informed Kent of the condition of his own loran, the disaster would never have occurred.

times its performance was satisfactory, although the log never so indicated. In all events, the log on October 17 showed "operation fair, and under evaluation." The only other entry prior to December 18 was on November 12, "No third function—inaccurate." McManus testified that the third function was, in substance, a refined tuner essential to an acceptable result.

On December 18, according to his testimony, McManus took loran readings on the way out, which he found to be reliable. There is no written record of such, but it is clear that he took a reading at 1600 when the tow commenced. He took another at 1700, which he concluded was inaccurate. He testified that he explained this inaccuracy at the time by the fact that the motion of the vessel, due to the heavy weather, had interfered with his ability to operate the equipment. We believe that it should also have served to remind him of the loran's past history of unreliability. He took another reading at 2005, which he testified he accepted as accurate. At 2105, when the tow was recommenced, he reported a loran position to his base, but he conceded at the trial that this was a position simply worked out from his 2005 position. His final reading was at 2250. When he attempted another at 2345 the third function went out. McManus testified that he shut off the loran to cool, hoping that the third function would restore itself, and intending to check with the B & G's loran at 0100 if his had not come back. We can only regard this as a plan to lock the barn if it should be found that the horse had been stolen. By 0100, if they were on course, they would be close to the GRS buoy, with no need to check with anyone. If they were not by the buoy, they were already lost, in an area the Coast Pilot describes as "one of the most dangerous parts of the coast of the United States for the navigator."

The court described McManus' not checking with the B & G's loran immediately when his own went out as "incredibly irresponsible." The government's explanation that in hopefully waiting for his to cool McManus was comparable to someone "hanging up the telephone when the line is busy," seems to us a classic example of excessive advocacy. In the light of its past history there could be no confidence that the loran would return to usefulness. More important, there was another "line" available for the asking.

The government says in one breath that those on board the 95 "had no reason to foresee the unforeseeable—that they were anywhere near Rose and Crown shoals—" and in another, in seeking to explain how they were off course, that this was an "area of unusual strong, variable and erratic currents." This description must have been well known to McManus for, again, it comes from the Coast Pilot. We may also add that, as he was well aware, it was dark, with a sea running and a strong wind. The court's finding of inexcusable neglect must be affirmed.

Of course if the 95 had not been, in fact, out of position, the failure to check would not have occasioned any harm. The court found, however, that the 2250 loran reading was substantially inaccurate because it was not reasonably possible that the 95 could have been where the loran indicated and have come out where she did. This conclusion seems almost inescapable. When he squared off for it at 2300 McManus calculated the GRS buoy to lie 18 1/2 miles away, bearing 292°. At just under ten knots he predicted they should be "relatively close" by 0100. Instead, at that hour they picked up a radar target which was really the Rose and Crown unlighted can buoy. Their true position, which we will call PL, can be closely calculated by running a line from Sankaty Head through the Rose and Crown

can and continuing it the 3 1/2 miles the radar indicated.[15] PL was not 18 1/2 miles from McManus' assumed 2300 position, but only 13 1/2. They had been running nearly two hours, at roughly ten knots and were some 5 miles short of where they should have been. Furthermore, although they were headed 300° to make good 292° or more, PL bore from the supposed 2300 position 275°, another very substantial error. In total, PL was some 6 1/2 miles from the GRS buoy. Although government counsel emphasized currents, no witness testified that it was reasonable to find such a variance. But even should it be possible to be carried six miles in two hours, it is inconceivable that it could have happened in one. Had McManus requested a position from the B & G at 2345 the knowledge he would have received would have made the essential discovery.

In seeking exoneration the government makes much of the principle that a salvor who is a "good Samaritan" is not held to ordinary standards of care. See, *e.g.*, *The Henry Steers, Jr.*, E.D.N.Y., 1901, 110 Fed. 578. Compare *The S. C. Schenk*, 6 Cir., 1907, 158 Fed. 54. Whatever may be the limits of this principle with respect to volunteered salvage, we believe that if the Coast Guard accepts a mission it should conduct its share of the proceeding with acceptable seamanship. *United States* v. *Gavagan*, 5 Cir., 1960, 280 F.2d 319, *cert. den.* 364 U.S. 933; see Biggs, J., dissenting, in *P. Dougherty Co.* v. *United States*, 3 Cir., 1953, 207 F.2d 626, 642-50, *cert. den.* 347 U.S. 912. We refuse to take the government's view, and be party to adding to the honored motto, "Semper Paratus," the words "Interdum Prudens."[16]

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[15] The 3½ mile figure is confirmed by the testimony of the time it took, from the change of course, to run onto the shoal.

[16] "Always Ready," "Sometimes Careful."

The opinion of the majority of the court in *P. Dougherty Co.* v.

Before leaving this subject it may be asked whether the court's ultimate conclusion of liability is open to question where a number of its findings have been determined to be wanting. *Cf. Carey* v. *C.A.B.*, 1 Cir., 1960, 275 F.2d 518, 522. We agree with claimants, however, that the court's conclusions were not cumulative in the interdependent sense. It is sufficient that one substantially negligent action was a cause of the loss. We do not believe that any misconceptions which the court may have formed in any other matters entered into its findings regarding McManus' conduct with respect to the loran. We do not judge him for this on the basis of anything else that he may have done or may not have done. Nor do we judge him on any basis of res ipsa loquitur such as appears to have been the ground of some of the cross-examination to which he was subjected—that the vessel was off course and therefore his navigation must have been faulty. We base liability upon established fault.

Finally, we are unimpressed, as was the district court, with the government's claim that it is not liable because the B & G, had the 95 not appeared at all, would have been lost in any event. The burden on this was on the government. *Cf. Ladd* v. *United States*, E.D.Va., 1951, 97 F.Supp. 80, *aff'd*, 193 F.2d 929. We do not feel its unsuccessful attempt to establish this contention requires discussion.

The government asserts that the claimants were guilty of contributory negligence. This is by no means a fanciful contention. We do not agree with claimants that their only duty was to watch the towline and the behavior of their own vessel. Captain Kent was not a bargee, but an experienced mariner. The Coast Guard was not taking

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United States, *supra*, that the possibility of a court determination of negligence would be destructive of Coast Guard morale seems to us misguided in principle as well as based upon a misconception of a court's ability to distinguish between true negligence and hard choices under pressure.

full charge; its undertaking was to "assist." We cannot accept claimants' argument that it was in full control because it had the "superior authority of a military branch of the government." While it is of course true that, ultimately, there had to be a "dominant mind," the claimants, at the least, had an obligation comparable to that placed upon passengers in an automobile to watch out for their own safety in those jurisdictions which impose such an affirmative duty. *Cf. Chicago, R.I. & P.R. Co.* v. *Cox*, 10 Cir., 1953, 208 F.2d 871. While we do not criticize Kent for going below and leaving a man on watch, it is obvious, in view of his acknowledged special experience, that had Kent's attention been called to the light by Roberts, the man on watch, the stranding would not have occurred. Kent testified that he instructed Roberts to let him know if he saw a light, but Roberts testified that his only instructions were to report if he saw anything unusual, and that he did not consider a light, which he took to be a buoy, unusual.[17] The court accepted Roberts' version. While it seems to us far more reasonable to believe Kent, particularly in view of the court's finding that Roberts could not be expected to recognize a buoy if he saw one, and, in any event, difficult to understand what Roberts expected to see within his instructions on a dark night other than a light, we cannot say that the court was plainly wrong. Nor can we quite say that Roberts' version of his instructions, and the interpretation which he gave them, fell short of the duty that was upon the B & G. The court's finding of no contributory negligence must be affirmed.

Turning to the question of limitation of liability under 46 U.S.C. § 183, the district court denied the government's petition on, essentially, two grounds. The first was be-

[17] Roberts testified that Kent had instructed him to watch the fathometer for shoaling, but that no shoaling had occurred. See fn. 4, *supra*.

cause of the deficiencies of the vessel's equipment, as to which Commander Waters concededly stood in the position of an "executive officer," *Coryell* v. *Phipps*, 1943, 317 U.S. 406, 410, and had, in the court's opinion, at least presumed notice. Since we have held that these deficiencies were not in violation of any duty owed to the claimants, and were not themselves the cause of the loss, we have no occasion to consider the possibly difficult legal grounds, 46 U.S.C. §§183 (e), (f), affecting his presumed knowledge. For us to hold that the government was precluded from limiting liability because of deficiencies in equipment under such circumstances would be to impose upon the government the very obligation which we have held it did not undertake.

Alternatively, the impropriety of the conduct of McManus, as captain, in navigating the vessel, does not prevent limitation. It is against this very liability that the right to limit exists. *La Bourgogne*, 1908, 210 U.S. 95; *The George W. Pratt*, 2 Cir., 1935, 76 F.2d 902. This could not be affected by the fact that Commander Waters accepted McManus' recommendation that the Frederick Lee's relief mission be cancelled. Apart from the fact that this cancellation, in our opinion, was not improper, see fn. 6, *supra*, Waters' "rubber-stamping" of McManus, to quote the court, did not promote McManus to a managing agent in other respects, or in some fashion charge Waters with McManus' subsequent, but totally unrelated navigational errors.

Very possibly the district court's refusal to limit liability was based upon its misconception as to the effect of the defective equipment. In all events, it was mistaken. The government, like a private owner, is entitled to the benefits of the limitation statutes, 46 U.S.C. § 746. When the nature of the fault or faults is examined, which we have done with close attention because of this ultimate question, we consider this a clear case. The Coast Guard

supplied McManus with a vessel capable of performing the intended mission if properly operated, especially since the vessel to be assisted could furnish any needed loran position for the asking. The strand resulted from his lack of care and failure to exercise judgment. For this the government is liable; but it is likewise entitled to limit.

The decree of the District Court is affirmed in so far as it denies exoneration; the denial of limitation is set aside with instructions to enter a new decree granting limitation of liability.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6772.

UNITED STATES OF AMERICA,
PETITIONER, APPELLANT,
v.
SANDRA & DENNIS FISHING CORP., ET AL.,
CLAIMANTS, APPELLEES.

JUDGMENT

January 26, 1967.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed in so far as it denies exoneration; the denial of limitation is set aside with instructions to enter a new decree granting limitation of liability.

By the Court:
ROGER A. STINCHFIELD
Clerk
By: (s) DANA H. GALLUP
Chief Deputy Clerk

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6772.

UNITED STATES OF AMERICA,
PETITIONER, APPELLANT,
v.
SANDRA & DENNIS FISHING CORP., ET AL.,
CLAIMANTS, APPELLEES.

ORDER OF COURT

February 9, 1967.

Upon motion,

It is ordered that the time within which appellant may file a petition for rehearing be, and the same hereby is, enlarged to and including February 20, 1967.

By the Court:
ROGER A. STINCHFIELD, *Clerk*
By: .....
Chief Deputy Clerk

[cc: Messrs. Gwatkin, Katz, Parker, Kisloff, Dodd, Sleigh, Lobdell and Hallisey.]

Appendix F

Thereafter, on February 23, 1967, the following order was entered:

ORDER AND MEMORANDUM

February 23, 1967.

The petition for rehearing is denied. It argues nothing which was not fully argued before, or that could possibly have escaped the attention of the court.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.

Thereafter, on March 2, 1967, mandate was stayed.

Appendix G

The U. S. Code, Title 14, § 88, provides as follows:

(a) In order to render aid to distressed persons, vessels, and aircraft on the high seas and on waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property;

(2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations, and care for bodies of those who may have perished in such catastrophe;

(3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the Coast Guard; and

(4) destroy or tow into port sunken or floating dangers to navigation.

(b) The Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized. Aug. 4, 1949, c. 393, §1, 63 Stat. 501.

Public Vessels Act

The Public Vessels Act, 46 U.S.C., § 781 et seq. provides as follows:

SEC. 781. A libel *in personam* in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920. Mar. 3, 1925, c. 428, §1, 43 Stat. 1112.

SEC. 783. In the event of the United States filing a libel *in rem* or *in personam* in admiralty for damages caused by a privately owned vessel, the owner of such vessel, or his successors in interest, may file a cross libel *in personam* or claim a set-off or counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action: Provided, That whenever a cross libel is filed for any cause of action for which the original libel is filed by authority of sections 781-790 of this title, the respondent in the cross libel shall give security in the usual amount and form to respond to the claim set forth in said cross libel unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security shall be given. Mar. 3, 1925, c. 428, § 3, 43 Stat. 1112.

Merchant Vessels Act

The Merchant Vessels Act, 46 U. S. C., § 741 et seq. provides as follows:

SEC. 741. No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this chapter shall not apply to the Panama Railroad Company. Mar. 9, 1920, c. 95, § 1, 41 Stat. 525.

SEC. 742. In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. . . . . In case the United States or such corporation shall file a libel *in rem* or *in personam* in any district, a cross libel *in personam* may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party.

Limitation of Vessel Owners Liability, 46 U. S. Code, § 811 et seq., provides as follows:

SEC. 183. (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. R. S. § 4283; Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1749.

SEC. 188. Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters. R. S. § 4298; Feb. 18, 1875, c. 80, § 1, 18 Stat. 320; June 19, 1886, c. 421, § 4, 24 Stat. 80; June 5, 1936, c. 521, § 4, 49 Stat. 1481.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1404

CLARENCE ROBERTS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are the corporate owner[1] of the fishing boat *Barbara and Gail* and the surviving members or personal representatives of her crew. That rudderless vessel foundered upon the Nantucket Shoals in the winter of 1961 while the Coast Guard was attempting to rescue her and her crew from the North Atlantic. Like the government in No. 1423, this Term, petitioners ask the Court to review the judgment of the court of appeals in *United States* v. *Sandra & Dennis Fishing Corporation*, 372 F. 2d 189 (C.A. 1) (Pet. App. A–31, A–50). That court held the United States liable for the damages resulting from the loss of the *Barbara and Gail*, subject to the government's right

[1] The Sandra & Dennis Fishing Corporation.

265-423—67

to limit its liability to the value of the Coast Guard rescue vessel under the terms of the Shipowners' Limitation of Liability Act.[3]

The maritime accident from which this litigation flows is described both in the opinion of the court of appeals (Pet. App. A-32—A-49) and in the government's petition for certiorari in No. 1423, to which we respectfully refer the Court. Accepting the facts as stated by the court of appeals, the government's petition seeks review of the legal correctness of the First Circuit's imposition of liability upon the United States in circumstances where maritime law would not hold a private rescuer responsible, a ruling in conflict with decisions of other circuits and contrary to the provisions of the Public Vessels Act as interpreted by this Court.

The instant petition is directed toward and seeks review of the First Circuit's additional holding that, based on the facts here involved, the government is entitled to limit its liability under the Shipowners' Limitation of Liability Act, 46 U.S.C. 183 *et seq.*[4]

For the reasons which follow, we think the issues petitioners seek to raise do not warrant further review by this Court.

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[3] 46 U.S.C. 181-189. The Public Vessels Act entitles the United States to such limitation in the same manner as private shipowners (see 46 U.S.C. 789).

[4] Both the Public Vessels Act and the Suits in Admiralty Act, under which jurisdiction over the United States was asserted in this case, entitle the government to the same limitation of (or exoneration from) liability in maritime accidents as is "accorded by law to the owners, charterers, operators or agents of vessels" (see 46 U.S.C. 740 and 789).

1. Under the Shipowners' Limitation of Liability Act, the liability of a vessel's owner is limited to his interest in the vessel for loss or damage incurred without his "privity or knowledge." 46 U.S.C. 183(a). Those terms in the Act refer to the owner's personal participation in the fault or negligence causing or contributing to the injury. *Coryell* v. *Phipps*, 317 U.S. 406, 411. In other words, the shipowner is not precluded from limiting his liability for maritime injuries caused by the negligent acts of his employees or agents unless he has personally been privy thereto.[4] And where corporate shipowners are involved, the privity or knowledge must be that of its "managing officers" before the corporation may be charged with liability in excess of the value of its vessel.[5] The same rule applies to the government as a shipowner.[6]

Where an injury is the result of faulty seamanship or navigational errors committed after the vessel has commenced its voyage, the cause of loss has been consistently held to be without the owner's "privity or knowledge".[7] This settled rule is founded on the premise that the owner ashore has no effective control

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[4] See, *e.g.*, *Continental Ins. Co.* v. *Sabine Towing Co.*, 117 F. 2d 694, 697 (C.A. 5), certiorari denied, 313 U.S. 588.

[5] *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U.S. 502, 510–512; *Craig* v. *Continental Ins. Co.*, 141 U.S. 638, 646–647.

[6] *Austerberry* v. *United States*, 169 F. 2d 583, 593–594 (C.A. 6).

[7] See, *e.g.*, *La Bourgogne*, 210 U.S. 95, 122; *Oliver J. Olson & Co.* v. *Luckenbach S.S. Co.*, 279 F. 2d 662, 672–673 (C.A. 9); *The George W. Pratt*, 76 F. 2d 902 (C.A. 2); *Petition of Marina Mercante Nicaraguense, S.A.*, 248 F. Supp. 154, 165 (S.D. N.Y.), modified on other grounds, 364 F. 2d 118 (C.A. 2); *Timur Fishing Corp.* v. *Cap'n Bill, Inc.*, 160 F. Supp. 633 (D. Mass.).

over his vessel once underway, but is compelled to rely on the skill and judgment of those to whom he has entrusted its operation. *Spencer Kellogg & Sons, Inc. v. Hicks*, 285 U.S. 502, 511-512.

In the instant case, after a careful review of the lengthy record, the court of appeals unanimously concluded that the stranding of the *Barbara and Gail* was caused solely by "navigational errors" on the part of the officer commanding the Coast Guard rescue vessel, expressly rejecting the contention asserted by petitioners that deficiencies in the rescue vessel's equipment caused the loss (Pet. App. A-48). In reversing the lower court's refusal to allow limitation, the First Circuit explained (Pet. App. A-48-49):

> Very possibly the district court's refusal to limit liability was based upon its misconception as to the effect of the defective equipment. In all events, it was mistaken. The government, like a private owner, is entitled to the benefits of the limitation statutes. 46 U.S.C. § 746. When the nature of the fault or faults is examined, which we have done with close attention because of this ultimate question, we consider this a clear case. The Coast Guard supplied McManus with a vessel capable of performing the intended mission if properly operated, especially since the vessel to be assisted could furnish any needed loran position for the asking. The strand resulted from his lack of care and failure to exercise judgment. For this the government is liable; but it is likewise entitled to limit.

This aspect of the decision below is plainly correct. As the cases cited previously make clear, if the strand-

ing was caused by errors in seamanship not attributable to "managing officers" ashore, the government was entitled to limit its liability because the loss was caused by acts done without its privity or knowledge.* Since "[p]rivity, like knowledge, turns on the facts of particular cases," *Coryell* v. *Phipps*, 317 U.S. at 411, review by this Court solely to reexamine the court of appeals' analysis of facts peculiar to this case is not warranted. See *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508; *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440.

2. As noted above, the court of appeals held the government liable to petitioners in circumstances where a private voluntary salvor would not have been held responsible. Petitioners urge, as a basis for a grant of certiorari, that the court of appeals should have held the government liable by applying a different, more stringent standard (Pet. 10–11). But application of the higher standard contended for by petitioners—that the government "was obligated to use due care to maintain its [rescue] vessels and equipment in reasonably good working order" (Pet. 11)—would not affect the government's right to limit its liability (the portion of the judgment below ad-

*Thus, whether the Coast Guard vessel was a "seagoing vessel" so that, under 46 U.S.C. 183(e), the privity or knowledge of its master, "at or prior to the commencement of [its] voyage," should "be deemed conclusively the privity or knowledge of the owner of such vessel," in respect of "loss of life or bodily injury," is irrelevant. Since the government's liability was predicated on navigational errors, as to which knowledge prior to the mission could not have existed, petitioners' discussion of this point (Pet. 11–12) is not pertinent.

verse to petitioners).[9] For, as noted earlier (*supra*, p. 4), the court of appeals expressly found the cause of the stranding to be "navigational errors", not deficient equipment. Petitioners of course have no occasion to invoke this court's jurisdiction insofar as the judgment below is favorable to them. Cf. *Public Service Comm'n* v. *Brashear Lines*, 306 U.S. 204, 206.

3. Finally, petitioners' suggestion that the court of appeals failed to apply the "clearly erroneous" standard in reviewing the facts as found by the district court is not well taken. The First Circuit was well aware that this test is applicable in admiralty as in other appeals[10] and, as its opinion shows, applied it in this case (see, *e.g.*, Pet. App. A–46–47).

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[9] For this reason, petitioners' reliance (Pet. 3, 11) on an alleged conflict between the court of appeals' decision and this court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61, as a reason for granting certiorari, is misplaced. In any event, as the court below pointed out, no such inconsistency in fact exists (see Pet. App. A–40).

[10] See, *e.g.*, *Alcoa S.S. Co.* v. *Watson*, 313 F. 2d 522, 523 (C.A. 1); *American Union Transport Co.* v. *Aguadilla Terminal, Inc.*, 302 F. 2d 394, 396 (C.A. 1); and *Morales* v. *Bull S.S. Co.*, 279 F. 2d 299, 301 (C.A. 1).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

SANDRA & DENNIS FISHING CORPORATION, ET AL.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

On behalf of the United States, the Solicitor General prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit entered in these cases on January 26, 1967.

OPINIONS BELOW

The opinion of the court of appeals in No. 6772 (App. A, *infra*) is reported at 372 F. 2d 189. The court of appeals dismissed the government's appeal in No. 6637 as moot without rendering an opinion (App. B, *infra*). The opinion of the United States District Court for the District of Massachusetts (App. C, *infra*) is reported at 255 F. Supp. 737 (*sub nom. Petition of the United States as owner of Coast Guard Vessel CG–95321*).

JURISDICTION

The judgments of the court of appeals in both cases were entered on January 26, 1967. A timely petition for rehearing in No. 6772 was denied on February 23, 1967. By an order dated April 26, 1967, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari in No. 6637 to and including May 24, 1967. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether liability may be imposed on the United States for the failure of voluntary efforts by the Coast Guard to rescue persons and vessels in distress at sea in circumstances where maritime law would not impose such liability on a private party.[1]

STATUTES INVOLVED

The Public Vessels Act, 43 Stat. 1112, as amended, 46 U.S.C. 781 *et seq.*, provides in pertinent part:

> 46 U.S.C. 781.
>
> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States * * *.
>
> 46 U.S.C. 782.
>
> * * * Such suits shall be subject to and proceed in accordance with the provisions of the [Suits in Admiralty Act] or any amendment

[1] Reference to a related question which we wish to preserve for consideration should certiorari be granted is made in note 8, *infra*, p. 11.

> thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.
>
> 46 U.S.C. 789.
>
> The United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels.

The Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 741 *et seq.*, provides in pertinent part:

> 46 U.S.C. 743.
>
> Such suits [under this Act] shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * *

STATEMENT

1. *The underlying facts.* This case arises from the Coast Guard's unsuccessful attempt to rescue respondent's fishing vessel, rudderless in dangerous waters off the New England coast in the winter of 1961. The facts, as they appear in the opinion of the court of appeals (App. A, *infra*), may be summarized as follows:

Shortly before eight o'clock on the morning of December 18, 1961, the Coast Guard Rescue Coordination Center in Boston received a call from the master of the *Barbara and Gail*. In substance, the master of that fishing vessel reported that his vessel had lost

her rudder and was adrift in the North Atlantic about 52 miles southeast of the Great Round Shoals entrance to Nantucket Sound. The master stated that his vessel was not in immediate danger and that the weather was good, but that he desired to be towed to New Bedford, Massachusetts, the vessel's home port. In less than a half hour of the master's call for help, a Coast Guard patrol boat—the only one immediately available—was manned and under way to render assistance to the *Barbara and Gail.*

Because the reported good weather did not hold and the sea and wind became increasingly severe as the day wore on, the Coast Guard rescue ship was not able to reach the disabled fishing vessel until 3:45 that afternoon, but by four o'clock it had the *Barbara and Gail* in tow. At 6:00 p.m. the tow line parted in the heavy seas and, when great difficulty was encountered in re-establishing the tow, the Commanding Officer of the Coast Guard rescue vessel informed the *Barbara and Gail* that he was going to desist in the rescue attempt and send for a larger vessel. However, the master of the *Barbara and Gail* was apprehensive that his ship might drift upon Nantucket Shoals and, upon his urging, the tow was finally restored, after further effort, at 8:00 p.m. that evening. By that time the rough weather precluded an immediate attempt to make port directly, requiring instead a more windward course for the safety of the *Barbara and Gail.* It was not until eleven that night that the weather conditions moderated sufficiently to permit the Coast Guard rescue vessel to attempt a direct course to port.

The Nantucket Sound channel entrance was marked by the Great Round Shoals buoy identified by a double-flashing white light, the only one in the area with these characteristics. The Commanding Officer of the Coast Guard vessel expected to sight that lighted buoy at approximately 1:00 a.m. the next morning. In fact, the hours of maneuvering in heavy winds, high seas and bad weather had had a greater effect than his navigational judgment assumed, and he was actually some miles distant from the position he had calculated.

However, just at the expected time for sighting the beacon of the Great Round Shoals Buoy, a light was observed by the watch on the Coast Guard vessel. As it later developed, this was the Sankaty Head lighthouse, eleven miles away, which at a distance and under certain atmospheric conditions can impart the false impression of showing two flashes. In addition, a target, identified as a buoy, appeared on the Coast Guard vessel's radar at the expected bearing and distance, in line with the observed light. However, the target shown on the radar equipment was actually not the Great Round Shoals buoy. Rather, as the court of appeals noted, "[b]y a most unfortunate coincidence, the radar target on the same bearing to which they had attributed the light, was the Rose and Crown unlighted buoy [marking shoal water]. (The radar showed the substance without the light; the eye showed the light without the substance.)" (App. A, p. 25).

The Coast Guard vessel changed course to head for what was assumed to be safe passage up the channel. Instead, both she and the vessel she was assisting were

swept over part of the Nantucket Shoals. The Coast Guard vessel, with a shallower draft, was swept free; the *Barbara and Gail* was stranded on the shoal and later foundered with the loss of five of her ten-man crew.

2. *The proceedings below.* More than $1,500,000.00 in claims were filed against both vessels as a result of the stranding of the *Barbara and Gail.*[2] In June 1962 the government and the Sandra & Dennis Fishing Corporation each instituted separate proceedings under the Ship Owner's Limitation of Liability Act[3] for exoneration from or limitation of (to the value of the respective vessels) any liability arising from the incident. Respondent's proceeding was instituted in the District Court for the District of Massachusetts; the government's in the District Court for the District of New Hampshire, where the home port of the Coast Guard rescue vessel was located. On motion of some of the claimants, the government's action was transferred to the district court in Boston and consolidated for purposes of trial with respondent's proceeding.

The government's position on the issue of liability was two fold: (1) that the Coast Guard had not been negligent in conducting the attempted rescue; (2) that, absent a showing of willful misconduct or gross

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[2] Jurisdiction over the United States was asserted under the Public Vessels Act, 46 U.S.C. 781 *et seq.*, which incorporates by reference the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*

[3] 46 U.S.C. 181–189. Section 9 of the Public Vessels Act, 46 U.S.C. 789, entitles the United States to the same limitation of or exoneration from liability in maritime disasters which is "accorded by law to the owners, charterers, operators or agents of vessels."

negligence, a private party attempting a similar rescue at sea would be responsible only for injuries independent of, or distinguishable from, the peril apprehended by the vessel in need of assistance and that, under Section 3 of the Suits in Admiralty Act, 46 U.S.C. 743, and *Frank* v. *United States*, 250 F. 2d 178 (C.A. 3), certiorari denied, 356 U.S. 962, the government's liability (if any) was measurable by the same standard.[4]

On the day the cases were scheduled for consolidated trial, however, claimants entered into a stipulation of settlement with the Sandra & Dennis Fishing Corporation in the proceeding which that corporation had initiated. Upon the corporation's deposit of $75,000.00 the district court entered a decree exonerating the Sandra & Dennis Fishing Corporation from all other liability in the matter and enjoining any future actions against that corporation in any court arising from the incident in question. Thereafter the court denied the government's motion to modify that injunction and to present a cross-libel against the Sandra & Dennis Fishing Corporation in the government's own action,[5] from which rulings the government appealed (No. 6637, C.A. 1).

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[4] The government also urged that the master of the *Barbara and Gail* shared responsibility for the stranding because of his own negligent failure to keep track of his vessel's position, and was entirely responsible for the death of the crewmen because he delayed their rescue after the stranding, when, with the Coast Guard vessel standing by, he went below for his swim-fins without ordering the crew to abandon ship.

[5] That corporation had filed a claim for the loss of its vessel in the proceeding against the United States.

The proceeding initiated by the government was then tried on the issue of the government's own right to exoneration from or limitation of liability. After rejecting the contention that the Coast Guard's duty was measurable by the standards applicable to a private salvor in similar circumstances, the district court went on to find that the Coast Guard had been negligent in various respects during the course of the rescue operation, and held that the government was entitled neither to limitation of nor exoneration from liability (App. C, pp. 62–73). In addition, the district court ruled that the Coast Guard was solely at fault for the stranding of the *Barbara and Gail* and that the crew of the fishing vessel was free from contributory negligence (*id.* at 70–71).

On appeal (No. 6772, C.A. 1), all but one of the district court's findings of negligence were set aside and its decree reversed insofar as it denied the government the right to limit its liability. But the lower court's ruling that the government was not entitled to complete exoneration from all responsibility for the accident was upheld.

The court of appeals recognized that the Coast Guard was not obliged "to provide rescue service on demand," citing, *inter alia,* the Third Circuit's decision in this regard in *Frank* v. *United States, supra* (App. A, pp. 30–31). However, the First Circuit failed to follow the Third Circuit's holding in *Frank* that the government's liability in attempted rescue situations is measurable by the principles applicable to other volunteer salvors. Instead, the court ruled that, in undertaking to effect a rescue at sea, the Coast Guard warranted the capa-

bilities of the rescue vessel and the competence of its crew unless it gave "warning that they were unfit" to the vessel in distress (*id.* at 31). Since no such warning had been given, the court applied that higher standard of care. Thus, without finding that the *Barbara and Gail* had suffered a "distinguishable injury" from the peril it faced when it became disabled, or that the crew of the Coast Guard rescue vessel was guilty of wilful misconduct or gross negligence, the Court of appeals held the United States liable for the stranding.

The court based its conclusion on what it held to be "lack of care and failure to exercise judgment" on the part of the officer commanding the Coast Guard vessel, who, upon discovering just before midnight that his "loran"[6] equipment had become inoperative, relied on other means of navigation instead of attempting to utilize the loran on the *Barbara and Gail* to determine his vessel's position. The court reasoned that if a loran reading had been obtained from the fishing vessel, the stranding would have been averted because the Coast Guard Commanding Officer would have discovered his true position in time to avoid mistaking the Sankaty Head lighthouse for the Great Round Shoals buoy (App. A, pp. 34–35).[7]

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[6] "Loran" is a type of electronic device helpful in fixing the position of a vessel at sea, so-called from its purpose as a "long range aid to navigation."

[7] Despite its statements about the Coast Guard's "silence" and failure to give warning as to any defects in equipment or crew, it is plain from a reading of the court of appeals' opinion that it predicated its affirmance of the finding of government liability on the lack of due care, or negligence, on the part of the Commanding Officer in navigating the tow. Indeed, the

In addition, the court affirmed the district court's ruling that the *Barbara and Gail* was free from contributory negligence (App. A, pp. 37–38), and therefore dismissed the government's appeal in No. 6637 as moot (App. B, p. 40).

The United States petitioned for a rehearing in No. 6772, pointing out that the experienced mariner commanding the *Barbara and Gail* had himself not checked his navigational position with regular loran readings. Urging that the Coast Guard's obligations to assist the fishing vessel were certainly no higher than that of the vessel's own obligation to look out for its own safety, the petition asserted that if the fishing vessel were free from fault where its master decided against navigating by loran, then the government was similarly free from blame in the circumstances, or, alternatively, that if failure to navigate by loran was culpable negligence, then both vessels must be found to have been mutually at fault and the damages divided between them accordingly. On February 23, 1967, the petition for rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the First Circuit has held that higher standards govern the liability of the Coast

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court stated that "the fault, and the eventual miscarriage, was due basically to human error and not to inadequate equipment" (App. A, p. 32). Later in its opinion, the court below referred to the Commanding Officer's "inexcusable neglect" in not checking his position on the *Barbara and Gail*'s loran (*id.* at 34), his "substantially negligent action [which] was a cause of the loss" (*id.* at 36), and his "impropriety * * * in navigating the vessel" (*id.* at 38).

Guard than apply to private shipowners in cases involving the voluntary rescue of persons in distress at sea. That ruling is in direct conflict with a decision of the Court of Appeals for the Third Circuit, inconsistent with the express language of the Suits in Admiralty Act incorporated by reference into the Public Vessels Act, and contrary to holdings by this Court that the Public Vessels Act imposes on the United States no greater liability than that imposed by maritime law on private shipowners. The issue is important not only because it affects the tens of thousands of rescue attempts made annually by the Coast Guard, but also because the opinion below casts doubt on what were considered to be well-settled principles of federal maritime law—involving private as well as public salvors—without providing clear guidance for future cases.[8]

1. As the facts of this case illustrate, rescue efforts at sea entail substantial and unpredictable hazards. Because such undertakings are to be encouraged in the public interest,[9] the courts have long been reluctant to impose liability on a voluntary rescuer (a "salvor"

[8] If certiorari is granted, we preserve a challenge to the holding that the Coast Guard was at fault because the Commanding Officer of the rescue vessel did not obtain a loran "fix" just prior to the stranding, while at the same time respondent's vessel was free of fault although its master had not tracked his position by loran for many hours prior to that occurrence. Accept the facts as stated by the court of appeals, this ruling points up the court's error in holding the Coast Guard to higher standards than applied to private parties in like circumstances; here the voluntary rescuer was called to task for something for which the vessel assisted was not faulted. At the very least the fault was mutual, entitling the government to a division of the damages.

[9] See, *e.g.*, *The Blaireau*, 2 Cranch. 240, 266; *The Blackwall*, 10 Wall. 1, 12, 14.

in maritime law) acting in good faith. Accordingly, a private salvor has been held liable only where his efforts to save the vessel in distress cause an injury separable and independent from the original peril which brought about the rescue efforts, "In other words * * * a harm distinct from that from which the vessel is being saved." *The Noah's Ark* v. *Bentley & Felton Corp.*, 292 F. 2d 437, 441 (C.A. 5).[10] Without such a distinct injury, "[t]he overwhelming weight of opinion is that absent 'gross negligence' or 'wilful misconduct' a salvor is not liable [citations omitted]." *P. Dougherty Co.* v. *United States*, 207 F. 2d 626, 636 (C.A. 3), certiorari denied, 347 U.S. 912.[11]

The private counterpart to Coast Guard rescue missions is the person who goes to the aid of—and attempts to save—individuals and vessels in distress at sea. As the court of appeals acknowledged, the statutes authorizing the Coast Guard rescue efforts "do not amount to a general undertaking to provide rescue service on demand" (App. A, p. 30). And the court below recognized that there was no obligation on the government to have any particular vessel or equipment on hand (*id.* at 31), as with a private

[10] See also *The Laura*, 14 Wall. 336; *The Infanta Maria Teresa*, 188 U.S. 283; *Frank* v. *United States*, 250 F. 2d 178 (C.A. 3), certiorari denied, 356 U.S. 962; *Dorrington* v. *City of Detroit*, 223 Fed. 232 (C.A. 6); *The S.C. Schenk*, 158 Fed. 54 (C.A. 6); *Page v. United States*, 105 F. Supp. 99 (E.D. La.); *The Daniel Kern*, 27 F. 2d 920 (W.D. Wash.); *The Henry Steers, Jr.*, 110 Fed. 578 (E.D.N.Y.).

[11] See also *The Noah's Ark* v. *Bentley & Felton Corp.*, *supra*; *The Daniel Kern*, *supra*; *The Henry Steers, Jr.*, *supra*.

salvor.[12] Thus, the court apparently accepted the government's view that, in attempting to effect the rescue, the Coast Guard was acting as a volunteer salvor; yet it sustained the imposition of liability on the government.

2. Had a private party rather than the Coast Guard gone voluntarily to the aid of the *Barbara and Gail*, it is clear that no liability would have been imposed in the instant case. It is beyond dispute that the court of appeals found neither gross negligence nor wilful neglect in the conduct of the prolonged but ultimately unsuccessful rescue operation. And the harm which befell the fishing vessel was plainly not distinguishable from that which led to the attempt at rescue.[13] Indeed, as the First Circuit noted (App. A, p. 24),

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[12] Compare *The S.C. Schenk*, *supra*; *The Henry Steers, Jr.*, *supra*; *Kalle P.* (*Hansen* v. *United States*), 1953 A.M.C. 1581, 1585 (D. Ore.).

[13] The court of appeals was incorrect in its assumption (App. A, p. 37) that, where recovery is sought against an unsuccessful salvor, it is the salvor's burden to establish that the vessel in distress did not suffer a distinct injury. In limitation proceedings, the burden is on the claimants—here respondents—to establish liability upon the part of the petitioner. *Walston* v. *Lambertsen*, 349 F. 2d 660, 663 (C.A. 9), certiorari denied, 382 U.S. 980; *Coleman* v. *Jahncke Service, Inc.*, 341 F. 2d 956, 957–958 (C.A. 5), certiorari denied, 382 U.S. 974; *Binstock* v. *Friedman*, 330 F. 2d 267, 268 (C.A. 2); *The 84-H*, 296 Fed. 427, 431–432 (C.A. 2), certiorari denied *sub nom. Randolph* v. *Bouker*, 264 U.S. 596; see Gilmore & Black, *The Law of Admiralty* 705 (1957 ed.). And this requires proof that the injury actually suffered by the vessel was distinguishable from the peril from which her rescue was attempted. *Page* v. *United States*, *supra*, 105 F. Supp. at 102. The authority cited by the court of appeals, *Ladd* v. *United States*, 97 F. Supp. 80 (E.D. Va.), affirmed, 193 F. 2d 929 (C.A. 4), is not to the contrary and, indeed, is not even a salvage case.

stranding on the Nantucket Shoals was precisely the peril which the master of the *Barbara and Gail* himself apprehended when the Coast Guard vessel notified him that it was going to stand by for other assistance rather than continue its attempt to restore the towing hawser after it had parted in the rough seas (*id.* at 23–24). It was for this reason that the master convinced the Coast Guard to make one more try to restore the tow—which turned out to be successful.[14] Nevertheless, the court of appeals refused to apply the principles of maritime law governing the liability of voluntary rescuers to the Coast Guard's actions in this case. Instead, under a more stringent standard, it held the government liable.

That holding disregards the congressional mandate laid down in the Suits in Admiralty Act (as incorporated in the Public Vessels Act) and is contrary to recent decisions of this Court interpreting that legislation. In those statutes subjecting the United States to suit for maritime torts, Congress specified (46 U.S.C. 743): "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." As the Court stated in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 600, "the Public Vessels Act 'was intended to impose on the United States the same liability * * * as is imposed by the admiralty law on the private shipowner'."

[14] A private salvor is under no duty to persist in a rescue attempt until successful. See, *e.g.*, *The S.C. Schenk*, *supra*; *Dorrington* v. *City of Detroit*, *supra*; *The Henry Steers, Jr.*, *supra*; *Page* v. *United States*, *supra*.

In addition, the holding below that the United States is not governed by the principles of liability applicable to private salvors conflicts directly with the Third Circuit's decision in *Frank* v. *United States,* 250 F. 2d 178, certiorari denied, 356 U.S. 962.[15] In that case, like this one, the Coast Guard had dispatched its only available boat to the assistance of a vessel disabled in the Atlantic and imperiled by a storm. While the disabled vessel was under tow to port she heeled sharply, precipitating overboard a passenger who drowned before he could be rescued. In a suit under the Public Vessels Act, the decedent's administratrix asserted that the Coast Guard had negligently failed to save her husband because its rescue vessel had a defective reversing gear, incorrectly secured life rings, and a shorthanded crew. In an opinion by Judge Hastie, the Third Circuit determined that the United States was not liable since a private salvor would not be liable in like circumstances (250 F. 2d at 179–180):

> If the United States is liable at all for negligence of the Coast Guard in connection with an attempted rescue operation, the responsibility of this public agency arises no higher than that of a private salvor. Upon that limitation the full bench of this court was agreed

[15] Only a passing reference to the *Frank* case was made by the court below; that decision was cited in support of the court's statement that the Coast Guard was not required to have a vessel or any particular equipment available (App. A, pp. 30–31). No attempt was made by the court below to distinguish or otherwise come to grips with the contrary holding in *Frank* on the legal issue centrally involved.

> in *P. Dougherty Co.* v. *United States*, 3 Cir., 1953, 207 F. 2d 626, certiorari denied, 347 U.S. 912, * * * although on other points we were divided. We recognize that the Coast Guard, like a private salvor, renders voluntary assistance where no duty to help is owed the person or vessel in distress.
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> * * * * *
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> * * * We have only a diligent rescue effort which proved ineffectual for lack of adequate equipment, preparation or personnel. For such ineffectual effort a private salvor is not liable. * * * By parity of reasoning the United States also is relieved of liability in this case.

The district courts which have been presented with the question have agreed with the Third Circuit that the liability of the United States for unsuccessful rescues at sea is no greater than that of a private salvor. *Page* v. *United States, supra; Kalle P.* (*Hansen* v. *United States*), 1953 A.M.C. 1581 (D. Ore.).

3. Nor is the court of appeals' decision supported by the citations upon which it purported to rely (App. A, p. 36).[16] As we understand its opinion, the First Circuit has applied the standards of the law of *towage*

[16] *United States* v. *Gavagan*, 280 F. 2d 319 (C.A. 5), certiorari denied, 364 U.S. 933, does not support the proposition that the law of salvage is inapplicable to the Coast Guard's rescue operations at sea. Rather, it supports our position here. In *Gavagan*, the Fifth Circuit declined to apply maritime salvage law standards to errors committed by Coast Guard personnel located *ashore* and manning a search and rescue coordination center. The court was of the view that the shoreside activity was not fairly comparable to—and therefore should not be controlled by the principles governing—a salvage operation. The court went on, however, to state (280 F. 2d at 327): "Of course, to the extent that the [Coast Guard] activity is

to the circumstances of this salvage case.[17] But the relationship between tug and tow is obviously quite different from that involved in a voluntary rescue at sea. The former is a contractual arrangement, undertaken with foreknowledge of the circumstances, navigational problems, and weather conditions to be encountered; the latter involves unknown and often unforeseeable risks, frequently with hard choices to be made in difficult circumstances in the course of unexpectedly prolonged operations. Accordingly, under the cases cited *supra*, pp. 12–16, the obligations imposed by maritime law on persons who voluntarily risk their own safety to go to the aid of others in peril at sea are understandably quite different from those imposed upon persons who contract for towage. The court of appeals, however, failed to distinguish between the two situations.

4. Even if limited to rescues at sea attempted by the Coast Guard, the decision below will be of no small practical consequence if permitted to stand. During

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the same as that normally done by private persons, the law (here the maritime law on salvage) would control." And, to the extent that the dissent in *P. Dougherty Co.* v. *United States*, 207 F. 2d 626, 642–650 (C.A. 3), can be said to support the First Circuit's position, that dissent has been rejected by the Third Circuit itself in the later case of *Frank* v. *United States*, *supra*.

[17] Where a vessel undertakes to furnish motive power to another, it becomes obligated to perform its contract of towage with reasonable care and skill. Compare App. A, p. 36, with *Stevens* v. *The White City*, 285 U.S. 195, 200–203. That the situation here is governed by the maritime law of salvage, and not towage, is clearly established. See, *e.g.*, *The Judith Lee Rose, Inc.* v. *The Clipper*, 169 F. Supp. 885 (D. Mass.); *McConnochie* v. *Kerr*, 9 Fed. 50 (S.D. N.Y.).

the year ending June 30, 1965, the Coast Guard responded to nearly 40,000 calls for assistance, involving more than 100,000 persons and property valued at close to two billion dollars. Seventeen thousand of these incidents involved the bringing to port of disabled vessels; nearly two thousand lives were saved as a result of the various undertakings.[18] In view of the extensive scope of the Coast Guard's rescue operations, the holding of the court below that the government's liability is measured by the law of towage rather than salvage has a practical importance which itself justifies review by this Court. Whether the Coast Guard's rescue efforts will, in fact, be significantly impeded or deterred is conjectural; but there is little doubt that they will become considerably more costly. And it is virtually impossible to ascertain, from the court's opinion, what standard of care applies to Coast Guard rescue efforts, assuming the law of maritime salvage inapplicable.[19]

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[18] 1965 Annual Report of the Secretary of the Treasury on the State of the Finances, p. 144.

[19] In this respect, the opinion below is almost quixotic. Compare App. A, pp. 30–31 with App. A, pp. 35–36. What the Coast Guard must do not to "mislead" or "induce reliance upon a belief that it is providing something which, in fact, it is not providing" is quite unclear. On the one hand, the Coast Guard is not to be held to a standard of "due care," but, on the other, by its "silence" is held to a representation that it would "perform its functions with reasonable care" (*id.* at 31). How the Coast Guard must go about fulfilling its obligation "to conduct its share of the proceeding with acceptable seamanship" (*id.* at 36), however, is left unstated.

Finally, the First Circuit's opinion gives rise to uncertainty as to the continued vitality of the settled principles of private salvor liability. No reason was given by the court for treating the Coast Guard differently from any person who voluntarily undertakes to rescue another from peril at sea. Indeed, the opinion intimates the court's doubt as to the principles applicable "with respect to volunteered salvage" even where the Coast Guard is not involved (App. A, p. 36). The implication that a private person undertaking a maritime rescue under perilous conditions may be held liable, even though no showing of wilful misconduct or gross negligence is made and his conduct did not result in an independent and distinguishable injury, would conflict with the decisions of three other circuits,[20] the language of another[21] and consistent district court rulings.[22] The question of private salvor liability is itself an important one, and any doubt as to the continued vitality of the established rules might discourage voluntary salvage efforts and thus frustrate the humanitarian objectives underlying the existing doctrine.

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[20] *Dorrington* v. *City of Detroit*, 223 Fed. 232 (C.A. 6); *The S.C. Schenk*, 158 Fed. 54 (C.A. 6); *Frank* v. *United States*, 250 F. 2d 178 (C.A. 3), certiorari denied, 356 U.S. 962; *The Noah's Ark* v. *Bentley & Felton Corp.*, 292 F. 2d 437 (C.A. 5).

[21] *The Cape Race*, 18 F. 2d 79 (C.A. 2).

[22] *The Henry Steers, Jr.*, 110 Fed. 578 (E.D.N.Y.); *Page* v. *United States*, 105 F. Supp. 99 (E.D. La.); *The Daniel Kern*, 27 F. 2d 920 (W.D. Wash.); *Kalle P.* (*Hansen* v. *United States*), 1953 A. M. C. 1581.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

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Attorneys.

MAY 1967.

APPENDIX A

United States Court of Appeals for the First Circuit

No. 6772

UNITED STATES OF AMERICA, PETITIONER, APPELLANT,

v.

SANDRA & DENNIS FISHING CORP. ET AL., CLAIMANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,* MCENTEE and COFFIN, *Circuit Judges.*

William E. Gwatkin, III, Attorney, Department of Justice, with whom *J. William Doolittle,* Acting Assistant Attorney General, *Paul F. Markham,* United States Attorney, and *Morton Hollander,* Attorney, Department of Justice, were on brief, for appellant.

Morris D. Katz, with whom *Harry Kisloff* and *George J. Dodd* were on brief, for Eleanore T. McCarthy, Administratrix, et al., appellees.

John O. Parker, with whom *Ely, Bartlett, Brown & Proctor* was on brief, for Sandra & Dennis Fishing Corp., appellee.

January 26, 1967

ALDRICH, *Chief Judge.* At 0750 on the morning [1] of December 18, 1961, the Coast Guard Rescue Coordi-

[1] We will follow the Coast Guard 24-hour system of designating hours and minutes.

nation Center in Boston received a call from the fishing vessel Barbara and Gail (hereinafter B & G) giving a position about 52 miles southeasterly of the Great Round Shoal entrance to Nantucket Sound and stating that she had lost her rudder; that the weather was good, and that she was in no immediate danger, but that she wanted to be towed to her home port of New Bedford. The Center dispatched the Coast Guard patrol boat CG–95321 (hereinafter the 95) for the mission. Seventeen hours later the 95 had towed the B & G onto the Rose and Crown, an extensive shoal ten miles east of Nantucket, after experiencing unexpectedly heavy weather and a number of misfortunes. We use the benign word "misfortunes." To what extent they were faults were the principal factual issues in the case. The B & G and five members of her crew were lost. The government brought a petition for exoneration or for limitation, and for a declaration of fault on behalf of the B & G. After a seven-day trial the district court denied all three requests in an extensive opinion reported in 255 F. Supp. 737, and the government takes this interlocutory appeal. A number of questions of law are raised, but their application requires us to make first a detailed examination of the factual findings.

The 95 was 95 feet long, and drew 4 feet forward and 6 feet aft. Her cruising speed was 17 knots. She was equipped for towing. The B & G was an apparently conventional scalloper, 90 feet long and with a maximum draft of 10 feet. The 95 was under the command of Lt. (jg.) McManus, the B & G of S. S. Kent, the president and principal stockholder of her corporate owner, Sandra and Dennis Fishing Corp., a claimant herein. The other claimants are the members of the crew or their legal representatives. The officer in charge of the Center, who author-

ized the dispatch of the 95, and who was admittedly a managing officer in the limitation of liability sense, was Commander Waters.

The 95, temporarily stationed at Woods Hole, was the only immediately available Coast Guard vessel. She was on ready status, as against a larger and much slower vessel, the Frederick Lee, which was on six hours availability. At sea was the still larger Barataria, assigned to Texas Tower No. 2. The court did not criticize the Center for not ordering out the Lee or detaching the Barataria, and we believe quite correctly so. At the same time, because of her light draft, the 95 was not a heavy weather vessel, and if heavy weather had been expected there might have been more of a question as to the advisability of dispatching her. In point of fact the unexpected weather did not seriously impair her performance. The strand was occasioned not by the weather, but by the navigational procedures of her commanding officer.

Leaving Woods Hole at 0820 the 95 proceeded through the Sound and passed the Great Round Shoal lighted fairway buoy (hereinafter the GRS buoy) at 1124. Thereafter she encountered increasing winds and seas and twice reduced her speed. She picked up the B & G on her radar at 4 to 5 miles without difficulty and reached her at 1545. At 1600 the tow was under way and McManus radioed his loran position to the Center. He set a course back to the GRS buoy and proceeded thereon until 1800 when the towing hawser parted. The by-then-heavy seas and wind, plus the fact that the line had parted at the 95's end and so had to be recovered from the B & G, created great difficulties in reestablishing the tow. At 2035, having become apprehensive that the connection could not be effected at all, McManus radioed for assistance. Commander Waters thereupon instructed the Freder-

ick Lee to get ready and assigned her to the mission. He concluded, because of the weather conditions, that it would be preferable for the 95 to desist in her attempts to reestablish the tow. Kent, however, was apprehensive lest they drift down on some part of Nantucket Shoals, and upon his urging the hawser was finally passed. Just as Waters was about to send a message to desist he received word that the tow was proceeding satisfactorily, and that relief was no longer needed. Waters thereupon ordered the Lee to discontinue.

Because of the strain upon the B & G's stem occasioned by the heavy weather Kent requested to be towed as slowly as possible and more to windward. They proceeded variously until 2300, when Kent agreed that they might resume their regular course. At this point McManus determined that the GRS buoy bore 292°. He estimated an allowance for current and drift and proceeded at 300°.[1] At midnight he instructed the crew in the pilot house that he was going below for an hour, by which time the GRS buoy should be on their port hand. He requested to be called as soon as the buoy was seen, and, in any event, at 0100.

At about 0100 a double flashing light was observed some 40° off the port bow. Jenkins, who was in charge, used the radar and discovered a pip, or target, which appeared to be a buoy, and which the court found was "on the same general bearing as the light." Jenkins concluded that the light was the GRS buoy, whose characteristic was a short-long (double) flash. He accordingly called McManus. McManus looked at the double flash and believing, too, that it was the

[1] The court did not discuss the propriety of this allowance, but the record affords full data for checking, and indicates that it was reasonable.

buoy, ordered the course changed to head directly for it. Some twenty minutes later white water, which indicated a shoal, was observed two boat-lengths ahead. McManus endeavored to take evasive action, but with the wind and seas behind him was unsuccessful. The 95 was carried over the shoal, dragging the B & G after her. Because of her greater draft, the B & G struck, and remained fast.

At first no one knew where they were. McManus sent a call for help, giving a wrong location, but shortly determined that they were somewhere on the Rose and Crown, some 6 or 7 miles from the GRS buoy. The light which, because of conceded distortion, had appeared to have a double flash, and had led them onto the shoal, now appeared more clearly and was seen to be flashing only once instead of twice. Rather than a buoy, it was Sankaty Head Light, some 11 miles away. By a most unfortunate coincidence, the radar target on the same bearing, to which they had attributed the light, was the Rose and Crown unlighted buoy. (The radar showed the substance without the light; the eye showed the light without the substance.)

Meanwhile, from the B & G, which had lost her small boats, Kent informed McManus that if it became necessary to abandon ship he would have his men tied onto a line, to be buoyed by a keg, so that they could be picked up downwind. For reasons not clear to us Kent's men were still waiting for such instructions when the B & G was suddenly swept off the shoal and immediately sank. Kent and five men, though swimming free, were rescued, but five others were not seen.

In placing unlimited blame upon the government the court criticized the 95, her personnel, and Commander Waters in many particulars, making a num-

ber of findings unfavorable to the government. We list the major ones in the order of their first appearance. All of these, with one exception, the court held to be "negligent acts and omissions [that] were proximate causes of the disaster." For some, footnote comment will suffice; the rest we will deal with at greater length.

1. Radio direction finder inoperable.[3]

2. Fathometer seriously defective and hand lead not used.[4]

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[3] The RDF went out Saturday afternoon, December 16. There is no evidence that this type of device, originated long before the advent of the loran, is of such accuracy that it would have been of any special value in this case had it been operable. We find no evidence of negligence, and nothing in the record to support the court's finding that lack of this equipment was a proximate cause of the strand. If, however, we are misled by claimants' failure to introduce evidence on this score, the discussions and conclusions, *infra*, with relation to the defective loran are equally applicable here.

[4] The court's finding is well grounded. However, there are no subsidiary findings supporting the conclusion that failure to take soundings contributed to the loss, or any testimony on which such could be based. On the contrary, the claimant's evidence was to the effect that they kept watch on their own fathometer in order to be warned if the water shoaled below ten fathoms, and that it never did so until the point of the strand. While we confess that examination of the chart makes this testimony questionable, the court apparently accepted it, and claimants say in their brief, "There are gullies on Nantucket shoals so that the Barbara and Gail did not necessarily pass over less than ten fathoms." Under this circumstances we will not try to work out a basis of liability for which none of the parties contends. At the same time we might add that if it should have been found that the vessels passed through shoal water prior to the strand, we would have to conclude that Captain Kent's undertaking was, in fact, the B & G's minimum obligation of due care, and that failure to perform it was substantial contributory fault. See discussion of contributory negligence, *infra*.

3. Gyro compass had 3° error, and magnetic compass not used.

4. Loran inaccurate and unreliable.

5. Towline parted because of negligence.[5]

6. The 2250 loran position was erroneous.

7. Wrong to cancel request for relief after B & G back in tow.[6]

8. Loran broke down at 2345; McManus negligently failed to ask B & G for loran position.

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[5] The court did not find that the parting of the hawser was a proximate cause of the strand, but negligence in this respect is so serious a charge against the Coast Guard that we will briefly deal with it. The court's conclusion, rejecting the opinion of a government expert that the break was due to an inherent defect in the rope, was based upon a finding that the hawser was so fastened that the chafing gear, a canvass parcelling, was not in contact with the taffrail, with consequent wearing of the fibre. We believe that photographs introduced by the claimants, and stipulated to be of the broken line, conclusively demonstrate that the court resolved the testimony erroneously, and that the break occurred not off, but near the center of the parcelling. On this basis the finding of negligence is unsupported. We do not criticize the district court for this. Even on appeal counsel failed to point out the significance of the photographs, which show, however, that the parcelling had extended over both sides of the break.

[6] The court does not explain the basis for this finding. At the time that McManus cancelled the request, the 95 had the B & G in tow, and was proceeding satisfactorily. Kent not only had requested that the tow be reinstated, but had expressly approved the general direction and the speed they were making. The court said that it was regrettable that Waters cancelled the relief, but it did not find, and it could not be suggested, that the vessels should have stayed where they were and marked time for the ten or so hours it would have taken the Lee to reach them. On the basis of the tow continuing it could not have made any difference whether the relief was cancelled or not; the strand would have occurred long before contact could have been achieved.

9. Negligent misidentification of light.'

'The government makes a very persuasive argument, based on the fact that Sankaty Head light in mist with an easterly wind sometimes appeared from a distance as having a double flash rather than a single one, as Kent himself admitted, and on the further fact that there were no true double-flashing lights anywhere in the area except the GRS buoy, that the court erred in finding the misidentification to have been negligent. We agree with the government that the court put too much faith in the testimony of Captain Kent in his deposition as distinguished from his prior testimony at the Coast Guard hearing. On the later occasion, obviously recognizing the difficulty he had caused himself earlier, Kent repeatedly introduced qualifications that, in our opinion, were totally contradictory to what he had said previously. In his original statement Kent testified that "atmospheric conditions at times changed the looks of the light so at times *one light looks the same as the other light.* * * * the simularity in appearance has been—I've come in and out of there so many times that it's just when I see one, *even though they both look the same*, why they look *different to me, so that's how I distinguish them now.*" [Italics supplied.] Certainly, this "difference" could not be more clearly indicated as a "feel," appreciable only by one having particular experience. Yet in his subsequent deposition Kent testified that while Sankaty Head light appeared to flash twice, "the flashing was so much bigger * * * one light was brighter than the other light." The court accepted this new testimony and found that Sankaty Head appeared "substantially different" from a buoy. We prefer Kent's first testimony, not only because it is less suspect, but because we regard his explanation as physically implausible. The visibility of a light to the human eye must depend upon the luminosity that reaches the point of the observer. It seems to us obvious that as to any two lights, irrespective of their initial brightness, the luminosity at the utmost distance of visibility, or threshold, to the human eye must be the same. If it were brighter, it would have been seen sooner, *i.e.*, further away. We must reject Kent's attempt to explain away his previous statement.

10. Negligent failure to check identification of light.[8]

11. Coast Guard negligent in sending out improperly equipped vessel, or

12. in failing to inform B & G that the 95 was improperly equipped and improperly manned.[9]

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[8] We need not pursue this matter, nor the companion question of whether in the original identification McManus was negligent. We may say, in all fairness to McManus, that it is difficult for us to believe, even operating a Monday morning slide rule, see *Page* v. *United States*, E.D. La., 1952, 105 F. Supp. 99, 102, that where the 95 was looking for a buoy with two flashes in an area where nothing else was supposed to show two flashes, and found a buoy and a corresponding double flashing light in the area in which they were expecting to see one, it was negligent not to put a stop watch on the buoy and find it was flashing somewhat less frequently than it should have been. No one testified, and none of the extensive printed material introduced in evidence indicated that it is customarily to clock buoys. We think that the Coast Guard's asking Kent whether he did so (and receiving a negative answer) was not an admission that it should have been done, but, if anything, the reverse. However, even if it could be thought that McManus was imprudent with respect to his conclusion that the light was the GRS buoy, negligence in this regard is irrelevant. Or, rather, lack of negligence in this regard would not make any difference in the result. If the loran positioning, as the court properly found, was wrong and negligently arrived at, any mistaken identification of the light was but a consequence of McManus' negligence in not having previously discovered that he was substantially off course. Accordingly, that prior negligence remained an active, producing cause of the strand.

[9] There is at least a suggestion in the court's opinion that the 95 was improperly manned. We find no specific findings with respect to the crew, except as to the chafing gear. We believe this criticism, if made, was misplaced. See also fn. 5, *supra*. As to McManus, the fact that the court quite correctly found that he made an error did not mean that from the Coast Guard's standpoint, at least prior to this accident, he was unqualified to command. A detailed inspection report of the previous summer was reservedly commendatory of his ability. The matter of improper equipment we consider elsewhere.

13. Negligent delay in notifying the Center that hawser had parted.[10]

14. Negligent in taking route north of Nantucket.[11]

15. Negligent in relying on defective equipment.

16. Waters was negligent in accepting McManus' recommendation to cancel relief after the B & G was back in tow.

The findings not disposed of in the footnotes fall into three categories, deficiencies in equipment, deficiencies in navigation, and acts and omissions to be considered on the issue of limitation. Before discussing these findings, however, we first consider the extent of the obligation that the Coast Guard owed the claimants. We think it clear that the applicable statutes, 46 U.S.C. §§ 741–52, 781–90, do not amount to a general undertaking by the United States to provide rescue service on demand. See *Lacey* v. *United States,* D. Mass., 1951, 98 F. Supp. 219. The case of *Indian Towing Co., Inc.* v. *United States,* 1955, 350 U.S. 61, upon which claimants place principal re-

[10] When the towing hawser first parted there was no expectation that contact could not be reestablished. We do not think that McManus was required to report his difficulties until their seriousness became apparent. Furthermore, causation is totally lacking. If McManus had requested relief at the moment of the break, his relief was the Frederick Lee, which could not have reached the scene in time to prevent the strand. See fn. 6, *supra.*

[11] There was no testimony supporting this finding. In addition, although Kent denied that he knew McManus proposed to use the northern route, members of his crew contradicted him, and the facts themselves contradict him. Kent was an experienced navigator. He knew where he was, and he knew from his compass which way they were proceeding. Kent made several requests during the tow by his radio telephone, all of which McManus acceded to. It is inconceivable that he did not know where they were going, and would not have complained if there had been any reason for taking a different route.

liance, did not impose liability upon the government because the Coast Guard maintained insufficient equipment—there navigational aids—per se, but because it failed to maintain a particular aid after the plaintiff had been led to believe it could rely on it. How much equipment the Coast Guard is to possess, and how much money it is to spend, measured necessarily, by Congressional appropriations, must be for the government's uncontrolled discretion. We can recognize no obligation upon the government either to have had the 95 available, or to have had on board any particular equipment. *Frank* v. *United States,* 3 Cir., 1957, 250 F. 2d 178, *cert. den.* 356 U.S. 962; *Petition of United States,* D. Ore., 1963, 216 F. Supp. 775, 781.

What we do recognize is precisely in accord with the principle laid down in *Indian Towing,* namely, that the government must not mislead, and must not induce reliance upon a belief that it is providing something which, in fact, it is not providing. We think the first ruling by the district court, that the Coast Guard "was obligated to use due care to make certain that the vessels were kept in good working order" was excessive, but that its alternative ruling, "or give warning that they were unfit," 255 F. Supp. at 749, was exactly correct. By its silence when it accepted the mission it must be found that the Coast Guard led the B & G to believe that the 95 was reasonably capable of performing the task.[12] This would include a representation that she was competently manned, or, to put it another way, the silence was an undertaking that the crew of the 95 would perform its functions with reasonable care.

[12] We emphasize that this was not a warranty in the sense that a "representation" of seaworthiness has been suggested to be made to a seaman.

Commander Waters testified, and, as will be developed, we find nothing to impeach or to contradict his opinion,[13] that an inaccurate gyro was of no consequence if the magnetic compass was correct. He further stated that "we have navigated many years without loran," and that the mission "could have been carried out with her loran out, in the conditions existing at the time this mission originated, which were moderate weather and good visibility."[14] The record conclusively shows that he was correct, and that the fault, and the eventual miscarriage, was due basically to human error and not to inadequate equipment.

So far as the gyro compass is concerned, it had been installed two months before. It had shown various errors from time to time, and was still officially "under evaluation." The court found that on December 18 it had a 3° westerly error. The government witnesses denied this, but the pertinent pages of the verification log in which any checking with the magnetic compass is recorded unaccountably disappeared before trial. We could not say that the court's disbelief of the government witness under all the circumstances was plainly wrong. We do say, however, that the claimants take nothing from the fact that the gyro was inaccurate. The sole fault, accepting the court's findings, was in the failure to maintain the customary verification with the magnetic.

We need not consider the gyro further, however,

[13] It may be noted that such cross-examination as there was proceeded upon false assumptions that the magnetic as well as the gyro compass was out and that the radar was impaired.

[14] He might have added another condition was that the B & G was known to have an available loran. While we are not of the Mary Roberts Rinehart "Oh-if-she-had-only-known" school, it is clear that had McManus informed Kent of the condition of his own loran, the disaster would never have occurred.

because it is overshadowed by the loran. A 3° steering error produces a deviation of only 5%. Had the loran been accurate, the 95 would have had a correct fix at 2250, and would thereafter have traveled off course, as a result of a 3° error, less than a mile. Had McManus checked with the B & G's loran at 2345, the departure would have been half a mile. We turn, therefore, to the subject of the loran.

It would serve no purpose to describe all the past troubles the 95 had had with her loran. Sometimes, in spite of repairs, the log showed, "not operating properly," sometimes, not operating at all. We assume that at other times its performance was satisfactory, although the log never so indicated. In all events, the log on October 17 showed "operation fair, and under evaluation." The only other entry prior to December 18 was on November 12, "No third function—inaccurate." McManus testified that the third function was, in substance, a refined tuner essential to an acceptable result.

On December 18, according to his testimony, McManus took loran readings on the way out, which he found to be reliable. There is not written record of such, but it is clear that he took a reading at 1600 when the tow commenced. He took another at 1700, which he concluded was inaccurate. He testified that he explained this inaccuracy at the time by the fact that the motion of the vessel, due to the heavy weather, had interfered with his ability to operate the equipment. We believe that it should also have served to remind him of the loran's past history of unreliability. He took another reading at 2005, which he testified he accepted as accurate. At 2105, when the tow was recommenced, he reported a loran position to his base, but he conceded at the trial that this was a position simply worked out from his 2005 position. His final

reading was at 2250. When he attempted another at 2345 the third function went out. McManus testified that he shut off the loran to cool, hoping that the third function would restore itself, and intending to check with the B & G's loran at 0100 if his had not come back. We can only regard this as a plan to lock the barn if it should be found that the horse had been stolen. By 0100, if they were on course, they would be close to the GRS buoy, with no need to check with anyone. If they were not by the buoy, they were already lost, in an area the Coast Pilot describes as "one of the most dangerous parts of the coast of the United States for the navigator."

The court described McManus' not checking with the B & G's loran immediately when his own went out as "incredibly irresponsible." The government's explanation that in hopefully waiting for his to cool McManus was comparable to someone "hanging up the telephone when the line is busy," seems to us a classic example of excessive advocacy. In the light of its past history there could be no confidence that the loran would return to usefulness. More important, there was another "line" available for the asking.

The government says in one breath that those on board the 95 "had no reason to foresee the unforeseeable—that they were anywhere near Rose and Crown shoals—" and in another, in seeking to explain how they were off course, that this was an "area of unusual strong, variable and erratic currents." This description must have been well known to McManus for, again, it comes from the Coast Pilot. We may also add that, as he was well aware, it was dark, with a sea running and a strong wind. The court's finding of inexcusable neglect must be affirmed.

Of course if the 95 had not been, in fact, out of position, the failure to check would not have occa-

sioned any harm. The court found, however, that the 2250 loran reading was substantially inaccurate because it was not reasonably possible that the 95 could have been where the loran indicated and have come out where she did. This conclusion seems almost inescapable. When he squared off for it at 2300 McManus calculated the GRS buoy to lie 18½ miles away, bearing 292°. At just under ten knots he predicted they should be "relatively close" by 0100. Instead, at that hour they picked up a radar target which was really the Rose and Crown unlighted can buoy. Their true position, which we will call PL, can be closely calculated by running a line from Sankaty Head through the Rose and Crown can and continuing it the 3½ miles the radar indicated.[15] PL was not 18½ miles from McManus' assumed 2300 position, but only 13½. They had been running nearly two hours, at roughly ten knots and were some 5 miles short of where they should have been. Furthermore, although they were headed 300° to make good 292° or more, PL bore from the supposed 2300 position 275°, another very substantial error. In total, PL was some 6½ miles from the GRS buoy. Although government counsel emphasized currents, no witness testified that it was reasonable to find such a variance. But even should it be possible to be carried six miles in two hours, it is inconceivable that it could have happened in one. Had McManus requested a position from the B & G at 2345 the knowledge he would have received would have made the essential discovery.

In seeking exoneration the government makes much of the principle that a salvor who is a "good Samaritan" is not held to ordinary standards of care. See, *e.g., The Henry Steers, Jr.*, E.D.N.Y., 1901, 110 Fed.

[15] The 3½ mile figure is confirmed by the testimony of the time it took, from the change of course, to run onto the shoal,

578. Compare *The S. C. Schenk*, 6 Cir., 1907, 158 Fed. 54. Whatever may be the limits of this principle with respect to volunteered salvage, we believe that if the Coast Guard accepts a mission it should conduct its share of the proceeding with acceptable seamanship. *United States* v. *Gavagan*, 5 Cir., 1960, 280 F. 2d 319, *cert. den.* 364 U.S. 933; see Biggs, J., dissenting, in *P. Dougherty Co.* v. *United States*, 3 Cir., 1953, 207 F. 2d 626, 642–50, *cert. den.* 347 U.S. 912. We refuse to take the government's view, and be party to adding to the honored motto, "Semper Paratus," the words "Interdum Prudens."[18]

Before leaving this subject it may be asked whether the court's ultimate conclusion of liability is open to question where a number of its findings have been determined to be wanting. *Cf. Carey* v. *C.A.B.*, 1 Cir., 1960, 275 F. 2d 518, 522. We agree with claimants, however, that the court's conclusions were not cumulative in the interdependent sense. It is sufficient that one substantially negligent action was a cause of the loss. We do not believe that any misconceptions which the court may have formed in any other matters entered into its findings regarding McManus' conduct with respect to the loran. We do not judge him for this on the basis of anything else that he may have done or may not have done. Nor do we judge him on any basis of res ipsa loquitur such as appears to have been the ground of some of the cross-examination to which he was subjected—that the vessel was

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[18] "Always ready," "Sometimes Careful."

The opinion of the majority of the court in *P. Dougherty Co.* v. *United States*, *supra*, that the possibility of a court determination of negligence would be destructive of Coast Guard morale seems to us misguided in principle as well as based upon a misconception of a court's ability to distinguish between true negligence and hard choices under pressure.

off course and therefore his navigation must have been faulty. We base liability upon established fault.

Finally, we are unimpressed, as was the district court, with the government's claim that it is not liable because the B & G, had the 95 not appeared at all, would have been lost in any event. The burden on this was on the government. *Cf. Ladd v. United States*, E.D. Va., 1951, 97 F. Supp. 80, *aff'd*, 193 F. 2d 929. We do not feel its unsuccessful attempt to establish this contention requires discussion.

The government asserts that the claimants were guilty of contributory negligence. This is by no means a fanciful contention. We do not agree with claimants that their only duty was to watch the towline and the behavior of their own vessel. Captain Kent was not a bargee, but an experienced mariner. The Coast Guard was not taking full charge; its undertaking was to "assist." We cannot accept claimants' argument that it was in full control because it had the "superior authority of a military branch of the government." While it is of course true that, ultimately, there had to be a "dominant mind," the claimants, at the least, had an obligation comparable to that placed upon passengers in an automobile to watch out for their own safety in those jurisdictions which impose such an affirmative duty. *Cf. Chicago, R.I. & P.R. Co. v. Cox*, 10 Cir., 1953, 208 F. 2d 871. While we do not criticize Kent for going below and leaving a man on watch, it is obvious, in view of his acknowledged special experience, that had Kent's attention been called to the light by Roberts, the man on watch, the stranding would not have occurred. Kent testified that he instructed Roberts to let him know if he saw a light, but Roberts testified that his only instructions were to report if he saw anything unusual, and that he did not consider a light, which he took to be a

buoy, unusual.[17] The court accepted Roberts' version. While it seems to us far more reasonable to believe Kent, particularly in view of the court's finding that Roberts could not be expected to recognize a buoy if he saw one, and, in any event, difficult to understand what Roberts expected to see within his instructions on a dark night other than a light, we cannot say that the court was plainly wrong. Nor can we quite say that Roberts' version of his instructions, and the interpretation which he gave them, fell short of the duty that was upon the B & G. The court's finding of no contributory negligence must be affirmed.

Turning to the question of limitation of liability under 46 U.S.C. § 183, the district court denied the government's petition on, essentially, two grounds. The first was because of the deficiencies of the vessel's equipment, as to which Commander Waters concededly stood in the position of an "executive officer," *Coryell* v. *Phipps*, 1943, 317 U.S. 406, 410, and had, in the court's opinion, at least presumed notice. Since we have held that these deficiencies were not in violation of any duty owed to the claimants, and were not themselves the cause of the loss, we have no occasion to consider the possibly difficult legal grounds, 46 U.S.C. §§ 183 (e), (f), affecting his presumed knowledge. For us to hold that the government was precluded from limiting liability because of deficiencies in equipment under such circumstances would be to impose upon the government the very obligation which we have held it did not undertake.

Alternatively, the impropriety of the conduct of McManus, as captain, in navigating the vessel, does not prevent limitation. It is against this very liability

[17] Roberts testified that Kent had instructed him to watch the fathometer for shoaling, but that no shoaling had occurred. See fn. 4, *supra*.

that the right to limit exists. *La Bourgogne,* 1908, 210 U.S. 95; *The George W. Pratt,* 2 Cir., 1935, 76 F. 2d 902. This could not be affected by the fact that Commander Waters accepted McManus' recommendation that the Frederick Lee's relief mission be cancelled. Apart from the fact that this cancellation, in our opinion, was not improper, see fn. 6 *supra,* Waters' "rubber-stamping" of McManus, to quote the court, did not promote McManus to a managing agent in other respects, or in some fashion charge Waters with McManus' subsequent, but totally unrelated navigational errors.

Very possibly the district court's refusal to limit liability was based upon its misconception as to the effect of the defective equipment. In all events, it was mistaken. The government, like a private owner, is entitled to the benefits of the limitation statutes. 46 U.S.C. § 746. When the nature of the fault or faults is examined, which we have done with close attention because of this ultimate question, we consider this a clear case. The Coast Guard supplied McManus with a vessel capable of performing the intended mission if properly operated, especially since the vessel to be assisted could furnish any needed loran position for the asking. The strand resulted from his lack of care and failure to exercise judgment. For this the government is liable; but it is likewise entitled to limit.

The decree of the District Court is affirmed in so far as it denies exoneration; the denial of limitation is set aside with instructions to enter a new decree granting limitation of liability.

APPENDIX B

United States Court of Appeals
For the First Circuit
No. 6637

UNITED STATES OF AMERICA
APPELLANT

v.

SANDRA & DENNIS FISHING CORP., ET AL.,
APPELLEES

ORDER OF COURT

January 26, 1967

It is ordered that the appeal herein be, and the same hereby is, dismissed as moot.

By the Court:

ROGER A. STINCHFIELD,
Clerk.

By: /s/ DANA H. GALLUP,
Chief Deputy Clerk.

APPENDIX C

United States District Court

District of Massachusetts

IN THE MATTER OF PETITION OF THE UNITED STATES OF AMERICA, AS OWNER OF THE UNITED STATES COAST GUARD VESSEL CG–95321, FOR EXONERATION FROM OR LIMITATION OF LIABILITY IN ADMIRALTY No. 63–27–6

William E. Gwatkin, III, Admiralty & Shipping Section, Dept. of Justice, Washington, D.C., for Government.

John O. Parker, Ely, Bartlett, Brown & Proctor, George J. Dodd, Morris D. Katz, Katz & Kaplan, Robert J. Hallisey, Bingham, Dana & Gould, Harry Kisloff, William B. Sleigh, Jr., Blair L. Perry, Hale & Dorr, Boston, Mass., Jack London, New Bedford, Mass., Elmer Johnson, Joseph W. Lobdell, Boston, Mass., for claimants.

OPINION

June 30, 1966

CAFFREY, D.J.

These proceedings were commenced by the United States as owner of Coast Guard Vessel CG–95321 under the Limitation of Liability Act, 46 U.S.C.A. §§ 183–188, for exoneration from or limitation of liability arising out of the sinking of the Fishing Vessel BARBARA AND GAIL, which went down on December 19, 1961 with the loss of the lives of five

of her crew when the CG–95321 towed her onto the rocks of Nantucket Shoals. Claims against the United States have been brought by the Sandra & Dennis Fishing Corporation as owner of the F/V BARBARA AND GAIL by the personal representatives of the five members of her crew whose lives were lost, and by the surviving members of her crew for personal injuries and loss of personal effects. After trial I find and rule as follows:

At all times material to this action the United States was the owner and operator of CG–95321, a patrol boat of 90 gross tons, 95 feet in length, 18 feet in breadth, with a normal draft of 4 feet forward and 6 feet aft. She was powered by four 600 horsepower diesel engines on two shafts with a maximum speed of 21½ knots and a minimum speed of 7 knots. The home port of the CG–95321 was New Castle, New Hampshire, but at the time of the incident hereinafter described she was assigned to a search and rescue patrol on which she operated out of Woods Hole, Massachusetts.

The BARBARA AND GAIL was a wooden-hulled fishing vessel 90 feet in length, 19 feet in breadth, with a maximum draft of 10 feet. She was owned by the Sandra & Dennis Fishing Corporation, whose president and treasurer was Captain Sheldon S. Kent, and who was also the master of the vessel.

On December 16, 1961, the BARBARA AND GAIL left New Bedford, Massachusetts, with a crew of 10 men aboard, including Captain Kent, on a commercial fishing voyage to Georges Bank. She was equipped with radar, a fathometer, two loran receivers, a magnetic compass and a radio telephone, all of which were in good operating condition. On the morning of December 18, at about 6:15, Captain Kent discovered that the BARBARA AND GAIL had lost her rudder.

At about 7:50 a.m., on December 18, the Coast Guard Rescue Coordination Center (RCC) at Boston received a call through the Boston marine operator from the BARBARA AND GAIL requesting Coast Guard assistance. The RCC Controller on duty was LTJG Edward J. Crane, who talked with the BARBARA AND GAIL and was advised that she was disabled with a lost rudder but in no immediate danger and that she requested a tow to New Bedford. The message gave her communications facilities and identifying characteristics, and gave her position in loran coordinates and as 52 miles southeast of the Great Round Shoals buoy. This buoy marks the seaward entrance of a channel between the Atlantic Ocean and Nantucket Sound through the shoals between the eastern side of Nantucket Island and the southeast tip of Cape Cod. The message gave no weather information, but the weather on the scene at the time was fine, with no wind to speak of and just a little chop to the sea.

The search and rescue (SAR) functions of the Coast Guard are coordinated in the New England area by the Rescue Coordination Center (RCC) of the First Coast Guard District, whose geographic area encompasses the Atlantic Ocean from Montauk Point, at the tip of Long Island, out roughly 1500 miles beyond Cape Cod, into the Labrador Sea. In the coastal waters off Massachusetts the First Coast Guard District kept two vessels at all times standing by on patrol for SAR missions. One of these patrols was the Provincetown patrol, whose patrol area was generally between Cape Ann and Chatham, on Cape Cod. The other was the Vineyard Sound patrol, whose patrol area was generally from Chatham on around past Buzzards Bay. The Vineyard Sound patrol vessel, when not on a mission, was permitted to moor at Woods Hole, Massachusetts.

Both patrol vessels are on so-called "Alfa" status, which means either underway or ready to get underway in 15 minutes. The two patrol vessels are referred to as the major Alfa and the minor Alfa, the major vessel being a larger vessel such as a seagoing tug or ocean station vessel ordinarily assigned to Provincetown with access to the open ocean, and the minor patrol vessel being a 95, 110 or 125 foot patrol boat assigned to Vineyard Sound. Other Coast Guard vessels are in so-called "Bravo" status, ready to get underway within a specified maximum number of hours. On December 18, 1961 the Alfa vessel on the Vineyard Sound patrol was the CG–95321, a 95 foot patrol boat.

On receipt of the message from the BARBARA AND GAIL, Crane checked his weather reports and the status board giving the position of all available search and rescue vessels. The weather reports for coastal waters off New England were normal, predicting winds of from 10 to 15 knots, with seas of from 2 to 4 feet. His status board disclosed that of the two SAR patrol vessels, the Provincetown vessel was committed to another mission from which it was not to be diverted if there were other SAR vessels equally available and that the closest and most immediately available other Alfa vessel was the CG–95321, which was on the Vineyard Sound patrol. He accordingly dispatched the CG–95321 to assist the BARBARA AND GAIL, by message which was sent from RCC at 8:00 a.m.

Under his routine instructions the RCC Controller could not dispatch a 95 foot patrol boat more than 50 miles offshore without the approval of his superiors. The responsible superior was Commander John M. Waters, who was then the Chief of the Search and Rescue Branch for the First Coast Guard District.

He arrived at his office shortly after Crane had dispatched the CG–95321 and upon being advised by Crane of his action immediately approved it. Under the conditions then existing and predicted, the dispatch of a properly manned and equipped 95 foot patrol boat would not have been unreasonable.

The CG–95321 was manned by a crew of one officer and 14 enlisted men. Her commanding officer was LTJG Garald H. McManus, who was then 24 years old, a 1959 graduate of the United States Coast Guard Academy. After graduation he was assigned to the Coast Guard cutter BARATARIA, where he had, among other duties, served as operations officer and navigator and an underway officer of the deck. He took command of the CG–95321 in February of 1961. At the time of the trial he held the rank of Lieutenant and was assigned to duty as a navigation instructor at the Reserve Training Center at Yorktown, Virginia, where he taught beginners. He was relieved of command of the CG–95321 on January 9, 1962, 21 days after the disaster. He was then sent to school in Groton, Connecticut to "study up on loran" and then ordered to serve one year at a loran station on St. Paul's Island in Alaska.

The CG–95321 was equipped with a gyro compass, magnetic compass, radar, loran, fathometer, radio direction finder (RDF), and various radio equipment. Her RDF had become inoperative on December 16, 1961 and not only had not been repaired prior to the disaster but had not even been reported inoperative by McManus. Her fathometer had been troublesome for some time, at one point being described in the log as "lousy," and it was useless at speeds of 10 knots or better, or in rough seas. Because of prior dissatisfaction with attempts to use the fathometer it was not even turned on during this mission until after the grounding

of the BARBARA AND GAIL. The CG–95321 had lead lines for sounding depths on board but they were not used at any time during the mission.

From all that appears in the record, the magnetic compass was accurate, but it was not used. Instead, the CG–95321 was steered exclusively by the gyro compass which had been installed in September or October for evaluation. This gyro compass was inaccurate, having a consistent westerly error, usually 3 degrees off, from a true heading.[1] Her loran had been inaccurate and unreliable almost since the day it was installed. On March 27, 1961, just a week after it was installed, the loran was inoperative. It was again or, perhaps, still inoperative on March 30. On April 12, 1961, just six days after being returned to the boat after repairs, the loran was once again inoperative. On June 25 the log entry reports that the loran was not normal. On June 27 the log entry is

[1] The compass comparison log, also called the compass check log, which was used to record for comparison readings taken from the gyro compass and the magnetic compass, was not produced at trial. In lieu thereof, photostatic copies of certain pages from this log were admitted in evidence as Roberts' Exhibit 15. Counsel for the Government stipulated in open court that at all material times the Coast Guard has had custody of this book and that save for the time that it was before the Marine Board of Inquiry it was aboard the CG–95321. An examination of Exhibit 15 shows that the pages of this comparison log covering the critical 77-day period from November 13, 1961, some 35 days prior to the accident, to January 30, 1962, some 42 days after the accident, were torn out of this book prior to its production as evidence at the trial. The purpose of the book, of course, is to reflect the accuracy or inaccuracy of the compass and the destruction of this evidence while the book was in the custody of the Coast Guard, and presumably in the custody of the crew of the CG–95321, gives rise to the inference, which I draw, that the information contained in the destroyed pages was adverse to the position of the Coast Guard in this case.

"set not operating properly." The same entry appears on August 4. On August 13 the loran was inoperative. It was still inoperative on August 23. On August 24 the set was worked on with negative results. On October 17 the log reports "operation fair and under evaluation." The last entry in the log for 1961 was made on November 12, about a month before the disaster. It reads "No third function—inaccurate." No repairs were made thereafter prior to December 19. The radar aboard the CG–95321 was apparently operating normally.

The CG–95321 received her orders at 8:10 a.m. on December 18 and was underway at 8:20. She proceeded at 550 rpm out of Nantucket Sound by way of the Great Round Shoals Channel, passing the seaward fairway buoy at 11:24 a.m. As she passed the buoy and came to course 119 degrees true to head for the BARBARA AND GAIL, she reduced speed, first down to 410 rpm at 11:40 a.m., then twice more until at 3:00 p.m. she was down to 320 rpm, or 10 knots. The speed was reduced because of worsening weather. The first of a number of unexplained alterations in the ship's logs and the suspicious disappearance of records appears at this point. The log of the CG–95321 (Govt. Ex. 52) contains a notation of the course at 1300. This notation is obviously 122° marked over to read 115°. On the right hand page, which contains a running commentary on the events aboard ship, there appears a change of course notation at 1300 that is also 122° marked over to read 115°. No explanation for this change was given; indeed, although all crew members who stood pilot house watches testified, the person who made the change was never identified. It was claimed at trial that loran fixes were taken on the way out to the BARBARA AND GAIL but no positions were logged or marked on the chart.

The CG–95321 located the BARBARA AND GAIL without difficulty, picking her up first by radar at a range of four to five miles, and arriving at her position at 3:45 p.m. By 4:00 p.m., the CG–95321 had her in tow, at a position 46 miles from Great Round Shoals buoy, the BARBARA AND GAIL having drifted to the west and south during the day. After making up the tow, the CG–95321 set a course of 304° true, rung up a towing speed of 12 knots, and headed for the Great Round Shoals Channel entrance buoy. This course made no allowance for current or drift; it was simply a straight line from the CG–95321's 1600 position to Great Round Shoals buoy. For that matter, it should be noted, the 119° true course set by the CG–95321 on the way out to the BARBARA AND GAIL made no allowance for current or for any drift on the part of the BARBARA AND GAIL while she awaited the arrival of the CG–95321.

The CG–95321 used as the towing hawser a 900 foot length of 4-inch nylon rope which was relatively new, having been aboard ship for about a month. It was paid out to a length of about 700 feet and prior to the commencement of this trip it had been wrapped in a canvas chafing gear some 3 to 4 feet in length. The aft portion of this chafing gear was slightly forward of the taffrail when the tow commenced at about 1600. The towing hawser was placed in position aboard the CG–95321 by seamen Jenkins and Garcelon at a time when she was taking some water over the fantail. Jenkins said he checked the hawser and chafing gear after fastening it and then went below and turned in. He likewise testified that he watched the hawser between 1730 and 1800 from the rear window of the pilot house and that it was riding normally with the chafing gear in position on the taffrail. It is noteworthy that he was then serving

as O.D. and had a number of other duties to perform.

Garcelon testified that he too went below after connecting the hawser and returned to deck when it parted. Seamen Nofs who appears not to have been on duty at 1600 nevertheless testified that he observed the hawser from the pilot house for about an hour, then went to the ship's office, and then went below, returning to deck when the tow parted. McManus testified to fleeting checks of the condition of the hawser. It parted just aft of the chafing gear at 6:00 p.m.

Having in mind the testimony that the fantail was constantly taking water at this time, I find, first, that no one did, or testified that he did, go back to make a close and proper examination of the towing hawser and chafing gear at the taffrail. Secondly, having in mind the fact that the Court went aboard the CG-95321 at her base in New Castle, New Hampshire, in connection with certain pretrial discovery which took place thereon, and carefully examined the view from each of the pilot house windows, and having in mind the obstructions to the visibility of anyone seeking to look aft from the rear windows of the pilot house (see Roberts' Exhibits 7, 8), and the fact that it became dark at or shortly after 1630 on December 18, I am persuaded that no meaningful surveillance or inspection of the condition of the towing hawser or the position of the chafing gear was made at any time subsequent to the commencement of the tow at 1600. I find that the towing line parted because of the improper placement of the chafing gear on the towing line, compounded by the failure to maintain a proper surveillance of its condition during the tow, with the result that it was weakened by friction on the taffrail.

In so finding I have in mind that the chafing gear was successfully applied in a different way during the

second tow, and that during the second tow various members of the crew went aft to check the chafing gear and the towline at close range. On at least one occasion Garcelon had to readjust the chafing gear which had slipped so that it was no longer protecting the rope from chafing against the rail. I rule that the Captain and crew of the CG–95321 were negligent in not making a proper inspection of the towing hawser at any time prior to its parting. In ruling that negligence caused the line to part, I decline to give weight to Govt. Exhibit 69, a copy of the report of L. J. Sheehan, a deceased employee of the Boston Naval Shipyard, in which an opinion is expressed as to the cause of the rupture of the towline. In declining to give weight to this report I have in mind that there is nothing before me to indicate what factors Mr. Sheehan took into account or what information was supplied to him or what assumptions he made, and that his statement is both unsworn and not subject to the probing effects of cross-examination by the other parties to the litigation.

There was conflicting evidence at the trial concerning weather conditions during this mission, especially as to conditions about the time the tow parted. All of the witnesses agreed that the weather worsened after the tow began at 1600 and that it slackened off about 10:00 p.m. Various members of the crew of the CG–95321 testified at the trial that the wind reached speeds of "40–45 knots" (McManus), "40 knots" (Nofs), "35–40 knots" (Jenkins), and "25–30 knots" (Judkins). The height of the seas was estimated as 15–18 feet (McManus), 12–15 feet (Nofs), 10–12 feet (Judkins), and 6–8 feet (Jenkins).

In contrast to these versions of the weather conditions related at the trial, the hourly entries contemporaneously made in the ship's log by the crew-members

of the CG–95321 report that from 1400 on December 18 until 0300 December 19, the wind was logged as Force 6 on the Beaufort Scale, i.e., a wind of 22 to 27 knots. The log indicates that a Beaufort 6 wind is characterized as strong in United States Weather Bureau forecasts. For the same time period, sea conditions were logged as "4," i.e., a moderate swell. This is characterized in the log as a moderate sea. At 1821 on December 18, the Pollock Rip Lightship reported winds of 28 knots, with a sea of 10 feet. The United States Weather Bureau posted small craft warnings at 1800 for the area Block Island to Portland, Maine, and predicted northeast winds from 20 to 30 knots in the south portion. Finally, Captain Kent's description of the weather conditions corresponds to the log entries of the CG–95321.

I accept the entries in the log of the CG–95321 as correctly reflecting existing weather condititons and I disbelieve the contrary testimony of the crew-members because I find that at the trial they intentionally exaggerated the weather conditions.

After drifting around for 2½ hours in a vain attempt to reestablish the tow, McManus sent a radio message, at about 2035, to the First Coast Guard District headquarters, advising headquarters for the first time that he had lost the tow some 2½ hours earlier and requesting that he be relieved by a larger vessel. Although there appears on the ship's chart what purports to be a loran fix of his position obtained by McManus at 2005, the message he sent to headquarters requesting relief at this time did not contain a report of his position. Upon receipt of this message the duty officer conferred with Commander Waters about sending out the Coast Guard cutter FREDERICK LEE which was in New Bedford on Bravo 6 status, ready to get underway within a maxi-

mum of six hours, and at 9:42 p.m., the FREDERICK LEE was ordered out.

After sending his message, McManus informed Captain Kent that he had requested relief by a larger vessel and that he intended just to stand by until the larger vessel came out. In response Kent requested that the CG–95321 try to reconnect the tow because, as he put it, "I was afraid we might be drifting down onto Nantucket Shoals." The CG–95321 made another attempt to connect the towline and succeeded. The towing hawser was reconnected at 9:05 p.m., just as Commander Waters was dictating a message, which was never sent, instructing McManus not to take the BARBARA AND GAIL back in tow. At 9:20 p.m., the CG–95321 sent a message to the First Coast Guard District which was received in Boston RCC at 9:36 p.m., about the time the FREDERICK LEE was being dispatched, advising that she had the fishing vessel back in tow. This message reported the position of the CG–95321 at 2105, a position that does not appear on the ship's chart. This reported 2105 position, which was charted on Govt. Ex. 57, is extremely close to the 2005 position, which was transposed from the ship's chart. When asked at the trial about the proximity of these positions, McManus said it was "very possible" that the loran position reported to the First Coast Guard District was "predicated upon (his) 2005 reading." In short, he either guessed at his 2105 position or reported the position he had obtained at 2005, which was either mischartered on the ship's chart or misread when taken off the chart for broadcast.

After the CG–95321 had the BARBARA AND GAIL back in tow, Kent asked that he be towed to windward, into the sea, so as not to further weaken her stem. The CG–95321 complied with his request

and came to a northeasterly course at a towing speed of from 5 to 6 knots, with the towing hawser now at 600 feet. After they had been on this course for a while, McManus attempted a more northerly course, the BARBARA AND GAIL began to yaw, and at Kent's request the CG–95321 came back to the windward more. At 10:37 p.m., the CG–95321 changed course to due north. By 11:00 p.m. the weather had subsided enough for the BARBARA AND GAIL to be towed toward land. The CG–95321 came left to a course of 300 degrees true and came to a towing speed of 10 knots, heading, she thought, for the Great Round Shoals channel and New Bedford.

Before making his course change at 2300, McManus had obtained a loran position at 10:50 p.m., which he testified he considered at that time to be reliable. I find that the loran position McManus had obtained just before he turned toward shore was inaccurate and that he was in fact further south than that position indicated. In so finding I have in mind that the loran had been inaccurate and unreliable in the past, as reflected in the log entries, that the 1700 loran position which McManus had obtained placed him so far off his course that he himself considered it unreliable and disregarded it, that it failed completely one hour later, and, finally, that it is practically impossible that the CG–95321 could have begun at its 2300 position and steered a course of 300 degrees, yet run right onto the shoals in the position that she did.

At the point where he thought he was when he made his course change, the bearing of the Great Round Shoals channel entrance buoy was 292 degrees true and its distance about 18.5 miles. He set a course of 300 degrees in order to make allowance for current conditions. In determining what allowance should be made he did not consult his ship's chart, which re-

ported current conditions, but instead relied on his limited general knowledge as to what the current was supposed to be in this area.

McManus knew that the FREDERICK LEE had been ordered out to relieve him, but after he came left to his supposed course for Great Round Shoals channel, he sent a message to Boston RCC reporting that Capt. Kent had advised him that the BARBARA AND GAIL could withstand the tow. McManus concluded this message by advising that no relief was required. The message was received at Boston RCC at about 11:24 p.m., whereupon RCC Controller Slade, after conferring with Commander Waters, who regrettably concurred on the grounds that those on the scene were the best judges of their conditions and capabilities, canceled the FREDERICK LEE'S sailing orders.

At about 11:45 p.m. McManus attempted to get a loran reading but the third function went out and he could not obtain a fix. This was the same trouble that had been recorded in the last entry in the loran log. Even though he knew that the BARBARA AND GAIL had loran receivers, and despite the fact that he was steaming at 10 knots toward some of the most treacherous coastline in the United States, McManus, in an incredibly irresponsible act, shut down the loran without checking with the BARBARA AND GAIL from which he could have obtained a fix simply for the asking.

After shutting down his loran McManus ordered Jenkins to relieve him and he turned in. Before turning over the watch he advised Jenkins of their course and speed, the condition of the BARBARA AND GAIL, showed him what he erroneously thought was their approximate position on the chart, about 8 or 9 miles from the buoy, and advised him that the

loran was out. He confidently told Jenkins that he should have no land within 15 miles, that they should be close to the Great Round Shoals buoy at 1:00 a.m., that he should sight it on his port hand, to call him when the buoy was sighted, and to call him at 1:00 a.m. in any event.

During the next hour things on the CG–95321 were outwardly uneventful as she towed the BARBARA AND GAIL toward Nantucket Shoals. Seaman Garcelon was at the helm steering a course of 300° by the inaccurate gyro compass which was relentlessly pulling the CG–95321 to the south of its intended course. The ship was yawing about 3 or 4 degrees to either side of course. Toward 1:00 a.m., Jenkins went aft to check the towing hawser, and on his return to the pilot house he saw a light to port.

The determination of the critically important question of what was done to determine the identity of this light by those on the CG–95321 in the next few minutes depends entirely on the credibility of three crew-members who were in the pilot house and who testified at trial, McManus, Jenkins the O.D., and Garcelon the helmsman. I disbelieve McManus, whose entire testimony was completely tainted by his interest in the outcome of these proceedings and was contradicted by other evidence in many instances, whose testimony on this particular point was not corroborated by either of his shipmates who were on the bridge with him, and whose testimony as to the steps he took to identify this light is completely at odds with the careless way he had conducted himself throughout the mission. I believe the testimony of Garcelon, a truthful witness, who was the only member of the crew of the CG–95321 that testified at the trial who is no longer in the Coast Guard.

I find that when Jenkins saw the light from the

port bridge he called to Garcelon, who glanced at the radar screen, saw something, and responded, "Yes, you have a target here on radar." Jenkins went into the pilot house, looked at the radar and saw a pip which he interpreted as a buoy and which appeared to be on the same general bearing as the light. Without checking the chart or the light list to determine the characteristics of the Great Round Shoals buoy light, Jenkins then called McManus and reported that he had sighted the buoy. He ordered Garcelon to come left on the light but countermanded the order almost immediately when he noticed that the BARBARA and GAIL was hung out to starboard and was not coming around with the CG–95321.

McManus arrived in the pilot house about two or three minutes after he had been awakened. He spoke with Jenkins, who informed him of the light and the target on the radar, and looked through the windows of the pilot house at the light. Even though McManus by his own admission had been through Great Round Shoals channel at night only a couple of times, his entire conversation with Jenkins and his observations of the light took between 30 seconds and one minute. He did not consult his chart to determine the characteristics of the Great Round Shoals buoy light. He did not consult the light list which is specifically designed as an aid in the identification of navigational lights, and which gives detailed information about the characteristics of lights that is not available on charts. He did not time the light with a stopwatch, an accepted method of identifying lights which is usually conclusive when doubt exists. He did not check his radar. He did not determine his position by any means, even though he had taken only one position fix in the last five hours. He did not ask the BARBARA AND GAIL to use her loran to determine

their position. He did not inform the BARBARA AND GAIL that a light had been sighted, thereby forfeiting the benefits of Captain Kent's 33 years experience in these waters. He did not turn on his fathometer. He did not order the use of lead lines. He did not post a lookout with no other duties that would interfere with his duties as lookout. Instead, sending Garcelon below for fruit juice, McManus took the helm, turned straight toward the light, and with the BARBARA AND GAIL in tow steamed at 10 knots right onto Nantucket Shoals.

McManus, of course, thought he was heading for Great Round Shoals buoy, a Lighter Whistle Buoy, whose characteristics are a short-long flashing white light. This sort of characteristic has only one meaning, for it is found exclusively on a mid-channel or fairway buoy and on nothing else. The characteristics are a short flash of 0.4 seconds, a dark period of 0.4 seconds, and a long flash of 1.6 seconds, signaling the letter A in Morse Code. The characteristic short-long flash was repeated eight times per minute. Its 400 candlepower light was 16 feet above the water and in good visibility could be seen for a distance of nine miles. The principal navigational light in the vicinity is Sankaty Head Light on the east end of Nantucket Island. This is a major lighthouse whose light is 1,100,000 candlepower, 166 feet above the water, and 70 feet above the ground. In good visibility it can be seen for a distance of 19 miles. Its characteristic is a one-second white flash every 15 seconds. During certain atmospheric conditions, mostly when there is an easterly storm and there is a mist or dampness in the air, Sankaty Head sometimes seems to have a refraction which looks as if it is flashing twice. The flashing, however, is much bigger and brighter than the one at Great Round Shoals buoy. Furthermore, the flashes

seem to be practically the same length rather than short-long and are not repeated as many times per minute as those of the Great Round Shoals buoy.

I find that the light observed by those on the CG-95321 was Sankaty Head Lighthouse, not Great Round Shoals buoy. I find that the characteristics displayed by Sankaty Head that evening were substantially different from the characteristics of the Great Round Shoals buoy and that the light could have been properly identified as Sankaty Head if those aboard the CG-95321 had used proper seamanship. Specifically, I find that McManus and Jenkins were negligent in failing to properly identify the Sankaty Head Lighthouse. Since they were expecting to see the light of the Great Round Shoals buoy at about the time they sighted this light, they failed to observe the light for a sufficiently long period to enable them to accurately determine its characteristics and check its identity, and blithely assuming it was the light on the buoy they simply turned toward it without taking the most rudimentary precautions required by good seamanship for identifying navigational lights. Their observation of the light consisted of little more than fleeting glances to determine that it was indeed a flashing light. They did not time the light with a stopwatch. The Government took the position at trial that a short-long flashing light was meant to be identified by its characteristics and that timing of the light was not important to identification. The inconsistency of this position of the Government appears from the fact that McManus himself testified on deposition that the light was finally identified as Sankaty Head AFTER the BARBARA AND GAIL had gone aground by "timing the light with a stopwatch."

Moreover, an excerpt from the transcript of a portion of Capt. Kent's testimony at the Coast Guard

hearing (Govt. Ex. 79) contains questions by Lt. Commander Bruce regarding the characteristics of the Sankaty Head light. When Capt. Kent informed Commander Bruce that Sankaty Head light sometimes has a refraction which makes it look as though it is flashing twice, the Lieutenant Commander asked Kent, "Have you had occasion to check the timing of the characteristics or just similarity in appearance as you describe it?"

Dutton's "Navigation and Piloting," a recognized authority on proper seamanship, which McManus had used in school and aboard the BARATARIA and a copy of which was in the pilot house of the CG–95321, makes it clear that timing of lights is an important step to be taken in order to identify a light. I find that Sankaty Head light could have been properly identified if McManus or anyone acting under his command had timed it with a stopwatch.

During the time the BARBARA AND GAIL was under tow her engine was shut down, her wheel secured by a becket, and she was in effect under the navigational control of the CG–95321. While there is some conflict in the testimony as to the instructions given by Capt. Kent to Clarence Roberts who was standing watch when the grounding occurred, I find that Roberts understood his instructions to be to call Capt. Kent if he saw the fathometer reading go below 10 fathoms or if he observed anything unusual. Roberts was an ordinary fisherman, not shown to be qualified or experienced in navigation, and I find that during the period he was standing watch he in fact observed nothing unusual, save a slackening of the towline. He roused Capt. Kent when the slack towline was discovered but by the time Kent got on deck the line had become taut again and Kent returned to his quarters. I find that Capt. Kent did not see the light

toward which the CG–95321 had turned shortly before the line went slack. Although Roberts did see the light at some time prior to the grounding, being untrained in navigation he did not understand its significance and did not consider seeing a light unusual. I find no negligence in the fact that he did not report sighting the light to Capt. Kent, since Roberts reasonably was under the misguided impression that the crew of the CG–95321 were navigating a proper course to New Bedford.

After making its turn the CG–95321 steamed toward the light for 10 or 15 minutes. Garcelon returned to the pilot house with the fruit juice, cups, and ice cubes, followed by Bryant, the engineer, who came up just to get some juice. While standing on the port wing putting some ice cubes into his cup, Bryant saw breakers off the port bow. He poked his head into the pilot house and said, "What is this white water out here?" McManus responded, "That is what I would like to know." McManus tried to turn to port but could not bring the ship around and the CG–95321 was swept over the shoals without grounding. The BARBARA AND GAIL, however, was towed onto the shoals and ran aground. The CG–95321 cut the towline and maneuvered as close to the BARBARA AND GAIL as she could safely go, a distance at the closest of about 150 feet. Kent informed McManus that the BARBARA AND GAIL was hard aground and taking water fore and aft. Kent also said that he was preparing a keg and line so that if it became necessary to leave the ship his men would all be together on the line.

While these arrangements were being made aboard the BARBARA AND GAIL, the CG–95321 was frantically trying to find out where she was. Her first report of the grounding, apparently a radio-tele-

phone message sent minutes after the grounding, reported the fishing vessel aground on Great Round Shoals. This message was forwarded to the RCC but for some unexplained reason no action was taken by RCC. About 35 minutes later, McManus sent a message reporting the fishing vessel aground at Pollock Rip (pt. J on Govt. Ex. 57), a position about five miles away from the area where the sinking actually occurred. This message got some action from RCC which immediately dispatched a message requesting information as to the condition of the fishing vessel and the assistance needed by the CG–95321. McManus answered with a message received by RCC at 2:39 informing them that the fishing vessel had sunk at 2:01 a.m., that the CG–95321 was picking up survivors, and that no assistance was needed at present.

Charts were offered in evidence on which were plotted several different positions calculated by the Coast Guard to be the place at which the BARBARA AND GAIL grounded. These positions appear on Govt. Ex. 64 as positions I, J and L. I find that the site of the grounding and sinking of the BARBARA AND GAIL was on Rose and Crown Shoals in the general vicinity of and somewhere in between positions I and L, probably nearer to position I than to position L, and that the exact site of the grounding to this day has not been accurately ascertained. In any event, the sinking was in the order of 6 to 7 miles south of the Great Round Shoals buoy, the location at which McManus erroneously believed the CG–95321 to be. It should be noted that position J, the first point which the crew of the CG–95321 calculated to be the scene of the disaster, is 10½ miles south of the Great Round Shoals buoy.

Just before the BARBARA AND GAIL sank, the crew, wearing life jackets, was assembled on the for-

ward deck, where the keg and line had been prepared, and had been informed by Capt. Kent of the procedure to be followed when abandoning the ship. Capt. Kent returned to the pilot house for a pair of swim fins because he thought they would give him greater mobility and control of the direction of the line and keg with his men on it when they were in the water. As he was returning from the pilot house he stopped to put on the fins and as he did so, "the boat went out from under me." The BARBARA AND GAIL suddenly slid off the shoal and sank within seconds at 2:01 a.m. on December 19, 1961. As a result none of her crew was able to get on the line which had been prepared. The CG–95321 picked up, before 3:00 a.m., the five crew members of the BARBARA AND GAIL who survived this disaster. Clarence Roberts was rescued through the personal heroism of Jenkins who dove into the frigid December water without a life jacket and pulled him out. Some time shortly after 4:00 a.m. a Coast Guard plane arrived on the scene and dropped flares to illuminate the area, something that had not been done by the CG–95321 although she had flares aboard. The CG–95321 recovered three bodies later in the morning. Two bodies were never recovered. The CG–95321 returned to port with the five survivors and three bodies later that day.

The Government urges several theories seeking to escape liability for this tragedy. It first argues that it is immune from suits arising out of rescue operations of the Coast Guard because there is no relationship in the realm of private vessels comparable with that existing between a vessel in distress and a Coast Guard vessel which gratuitously comes to her rescue, citing *P. Dougherty Co.* v. *United States,* 207 F. 2d 626 (3d Cir. 1953).

Under the Public Vessels Act, which by reference

incorporates the Suits in Admiralty Act, 46 U.S.C.A. 741–752, the United States relinquished its sovereign immunity and consented to be sued according to the principles of law obtaining in like cases between private parties for damage caused by a public vessel of the United States. *Canadian Aviator, Ltd.* v. *United States,* 324 U.S. 215, 65 S. Ct. 639, 89 L. Ed. 901 (1945). Whatever persuasive effect the Dougherty decision had in the face of the forceful and well-reasoned dissenting opinion of Chief Judge Biggs has been completely eliminated by the rationale of subsequent decisions of the Supreme Court interpreting the Federal Tort Claims Act, particularly those in *Indian Towing Co.* v. *United States,* 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955) and *Rayonier, Inc.* v. *United States,* 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 2d 354 (1957), which make it abundantly clear that the United States is now liable for its negligent torts in areas where it once could avail itself of the shield of sovereign immunity to avoid answering for its wrongdoing. See also *Eastern Transportation Co.* v. *United States,* 272 U.S. 675, 47 S. Ct. 289, 71 L. Ed. 472 (1927), cited in Fn. 2 of *Indian Towing.* It is significant for purposes of the instant case that in the course of his analysis of the Government's liability in the *Indian Towing Co.* case, Mr. Justice Frankfurter noted (350 U.S. at p. 67, 76 S. Ct. 122) and reaffirmed the fact that the Government had tried but failed to escape liability under the Suits in Admiralty Act for negligent performance of a so-called "purely governmental function" in the *Eastern Transportation* case decided back in 1927.

The Government next argues that its obligation in a case of attempted rescue by the Coast Guard is in no event greater than that of a private salvor and that accordingly its conduct should be measured by

the legal standard of the so-called Good Samaritan doctrine, citing *Frank* v. *United States*, 250 F. 2d 178 (3d Cir. 1957) and Petition of United States, 216 F. Supp. 775 (D. Ore. 1963). Under its interpretation of this doctrine the Government contends that the Coast Guard has no duty to provide a seaworthy vessel to answer a request for assistance, nor even to provide one with equipment in good working order, but that those unfortunate mariners who become in need of assistance must take as they find her whatever vessel the Coast Guard deigns to send to their assistance.

The Government closes its eyes to reality when it persists in considering the Coast Guard's rescue operations as the equivalent of the situation in which one private vessel goes to the aid of another. Today and for some years past, the United States Coast Guard has carried out a search and rescue operation on a grand scale, which it is authorized to do by statute, 14 U.S.C.A. § 88 (a)(1), (b), and which it is directed to do by the National Search and Rescue Plan promulgated in March 1956 by the President's Air Coordinating Committee. See *United States* v. *Gavagan*, 280 F. 2d 319, 322 (5th Cir. 1960). The nature and extent of these activities are widely publicized through the public relations offices of the Coast Guard and other participating branches of the military service. The availability, and the usual excellence, of the search and rescue service and the fact that many mariners have been saved over the years by heroic action of the Coast Guard, Navy and Air Force are such matters of common knowledge as to be a proper subject for judicial notice. As a result of the holding out of the availability of this search and rescue service and the extensive publicity which it has received over the years, mariners, commercial fishermen, yachtsmen and pleasure boaters, indeed all those who go down to the

sea in ships, have been induced to rely on this usually excellent search and rescue service rather than seek assistance from private sources. The instant case is but one example of this reliance. Disabled because rudderless, but in no immediate danger, the BARBARA AND GAIL, which merely needed a tow to land, turned to the Coast Guard for assistance rather than call upon a fellow fisherman. On the other side of the coin, those fishermen and mariners who, true to the tradition of seafarers would otherwise go to the aid of vessels in distress or in need of assistance, now rely on the Coast Guard to do so. For example, in the case of *Trawler Frank C., Inc.* v. *United States,* In Admiralty No. 63–65–C, D. Mass. Dec. 22, 1965, decided by this Court, even though four fishing vessels were fishing off a common float they called for Coast Guard help and let the Coast Guard take over both the fire-fighting on and the towing of the disabled fishing boat.

To paraphrase *Indian Towing Co.* (350 U.S. at p. 65, 76 S. Ct. 122), even assuming that the Coast Guard need not have undertaken the search and rescue service, once it exercised its discretion to operate a search and rescue organization and engendered reliance on the competent assistance usually afforded by the vessels engaged therein, it was obligated to use due care to make certain that the vessels were kept in good working order; and, if the vessels were unfit for the job, then the Coast Guard was further obligated to use due care to discover this fact and to repair them or give warning that they were unfit. If the Coast Guard failed in its duty and damage was thereby caused to claimants, the United States is liable. I rule that the Coast Guard was under a legal duty to send out on this assistance mission a properly equipped vessel, manned by a competent crew, or else to inform the BARBARA AND GAIL that the Coast Guard

did not have available a ship reasonably fit for the intended assistance mission or a captain and crew reasonably qualified to perform the assistance mission, and that the Coast Guard negligently breached these obligations.

I find that the Coast Guard assigned to this mission a vessel equipped with a defective loran, a defective gyro compass and repeater, a defective fathometer, and a totally inoperative radio direction finder. I find that McManus, who under the Coast Guard's chain of command was the officer responsible for deciding the vessel's capability of performing the mission, knew of all these defects and was negligent in not reporting to Coast Guard headquarters that the vessel was incapable of performing the mission due to this mass of defective gear and in nevertheless undertaking the mission; and that the BARBARA AND GAIL was never informed that the CG–95321 was navigating with all this defective equipment.

I find that McManus violated the Coast Guard's duty to use ordinary care in performing this mission by delaying unduly in reporting to First Coast Guard District headquarters that the hawser had parted, by electing to try to run the northerly route back to New Bedford instead of taking the slightly longer but much more shoal-free southern route, by relying on his defective equipment and assuming that he got accurate bearings therefrom, by telling Headquarters that he did not need relief, by failing to obtain the use of the loran and other navigational equipment on the BARBARA AND GAIL, by failing to identify Sankaty Head light as such, and by mistaking it for the Great Round Shoals buoy light. I rule that these negligent acts and omissions were proximate causes of the disaster which befell the crew of the BARBARA AND GAIL, including the loss of five lives.

The Government also contends that it is entitled to escape responsibility in this case because there has been no affirmative showing that the BARBARA AND GAIL was deprived of any available assistance from some other source because of misplaced reliance on the services of the CG–95321, an allegedly essential element of a cause of action against the United States. I rule that claimants have no such burden of proof and that the Coast Guard is liable for damages caused by its negligence to any mariners who in fact have relied on the availability of its search and rescue services. When, as in the instant case, the Coast Guard has failed to use reasonable care in the course of attempting a rescue operation, it will not be heard to say that the unfortunate victims did not rely on the availability of its services.

On the other hand, if a showing is necessary that claimants forewent the services of other available rescuers, the record discloses that the BARBARA AND GAIL had a ship-to-shore radio telephone in good working order, that their call for assistance came from a position near Georges Bank, that at all material times they were on fishing grounds heavily used by the New England fishing fleet, and that Captain Kent has been a member of the New Bedford fishing fleet for some 33 years. On the basis of this record I find that by calling the Coast Guard for assistance the BARBARA AND GAIL passed up the opportunity to call for help from other fishermen in the general area of Georges Bank or from other members of the fishing fleet who were on shore and who certainly would respond to a distress call from a fellow fisherman. The Government's contention, which in effect is that on this record the Coast Guard was the sole rescuer available, is totally untenable, in view of the degree of commercial fishing and other shipping car-

ried on daily off the New England coast and particularly in the area of Georges Bank and off Nantucket Island. It is clear that a call for private help at either 8:00 a.m. on December 18 or at any time before the CG–95321 reestablished the tow would have been early enough to assure the arrival of help in view of my findings as to the probable drift of the BARBARA AND GAIL and the evidence that sea anchors could have still further slowed down that rate of drift.

Finally, the Government argues that in any event the BARBARA AND GAIL suffered no so-called distinguishable injury, even assuming negligence on the part of the Coast Guard, because the Government claims that if left untowed the BARBARA AND GAIL would have fetched up on Rose and Crown shoals a few hours after the actual grounding because of prevailing winds and currents.

The Government relies on the testimony of Dean F. Bumpus, an oceanographer and an expert on the currents and tides of the Atlantic coastline. The argument is made that the parting of the towline occurred without the fault or negligence of the CG–95321, that had she not then taken the BARBARA AND GAIL back in tow the BARBARA AND GAIL certainly would have gone aground on the Nantucket shoals, that this is what in fact did occur, and therefore that the BARBARA AND GAIL sustained no distinguishable injury. I find, on the contrary, that the sinking of the BARBARA AND GAIL was an independent injury caused solely by the negligence of the Coast Guard. The finding that the towline parted due to the negligence of the crew of the CG–95321 undermines the cornerstone of the Government's argument, for, in view of that finding, the critical position of the BARBARA AND GAIL for purposes of applying the distinguishable injury rule is her position when the

tow began. From that position, according to Mr. Bumpus, she would have drifted "out through South Channel clear of any shoals." Furthermore, the diagram prepared by Mr. Bumpus showing the course that he calculated the BARBARA AND GAIL would have followed if the CG–95321 had not reattached the towline (Govt. Ex. 78, superimposed on Govt. Ex. 57) was prepared on the false assumption that the BARBARA AND GAIL would have been drifting without any anchor dragging and for that reason is inaccurate. The BARBARA AND GAIL had three scallop dredges, or drags, on board, each weighing about 1100 or 1200 pounds. There were 200 fathoms of 7/8" steel cable on each drum of the winch. These dredges were often used as anchors while the BARBARA AND GAIL was fishing. A dredge would be attached to the line on the drum, thrown overboard and towed for a while until it filled up with rocks, and then was given some more line so that it served as an effective anchor. I find that Captain Kent would certainly have put a dredge overboard if he were adrift at the 2005 position and that the weight of the dredge would have had a substantial effect on the drift of the BARBARA AND GAIL. I therefore conclude that Govt. Exhibit 78 is based on inaccurate factual data and I am not persuaded that the BARBARA AND GAIL would have fetched up on the shoals if the Coast Guard had not reattached the towline.

Another vice in Govt. Exhibit 78 is the fact that it is based on weather testimony of the crew that is inconsistent with those conditions reported in the log. Earlier in this opinion the crew's testimony has been rejected, as untruthful, and a finding has been made that the conditions reported in the log were the actual conditions. Mr. Bumpus prepared a diagram showing the drift of the BARBARA AND GAIL based on the

weather data in the log of the CG-95321. According to that exhibit she would have arrived in the vicinity of the Great Round Shoals buoy 24 hours later. She thus would have drifted without grounding for the entire day of the 19th in an area heavily travelled by shipping.

Finally, Govt. Exhibit 78 and Roberts' Exhibit 32 are based on the assumption that the 2005 position is accurate. And this points up the key to this disaster. The evidence is overwhelming that McManus did not know where he was for most of the trip. I find that the 2005 position is inaccurate and for that reason Govt. Exhibit 78 is inaccurate.

I rule that this case involves a distinguishable injury caused by the negligence of the Coast Guard and that the governmental contention that no distinguishable injury is involved herein is totally devoid of factual foundation on this record, being predicated on the opinion of Mr. Bumpus which, in turn, is bottomed on a series of assumptions which in the course of this opinion I have ruled to be non-factual, and I find that the sole cause of the sinking of the BARBARA AND GAIL was the negligence of the Coast Guard.

As a corollary thereto, I rule that the Government's contention that this disaster was caused either in part or in whole by the contributory negligence of the captain and crew of the BARBARA AND GAIL is also without factual foundation. I find that during the course of the tow, those aboard the BARBARA AND GAIL, relied on the navigational ability of the CG-95321 and that, though this reliance turned out to be misplaced, it was reasonable under the circumstances then prevailing. I likewise rule that there was no negligence on the part of the captain or crew of the

BARBARA AND GAIL after her grounding and sinking.

In *Coryell* v. *Phipps*, 317 U.S. 406, 63 S. Ct. 291, 87 L. Ed. 363 (1942), the Supreme Court restated the principle which is to be applied in determining a petition for limitation or exoneration filed by a corporate shipowner, saying at p. 410, 63 S. Ct. at p. 293:

> In those cases it is held that liability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred.

In the instant case, Capt. John M. Waters, Jr., presently Chief, Search and Rescue Division, United States Coast Guard, Washington, D.C., who, on December 18, 1961, held the rank of Commander and was Staff Search and Rescue Officer, First Coast Guard District, testified that on December 18, 1961 nothing had been brought to the attention of the Boston Search and Rescue headquarters to give that headquarters any reason to believe that the CG–95321 was incapable of performing search and rescue missions. Capt. Waters further testified that there was no Coast Guard regulation on December 18, 1961 which required the commanding officer of any Coast Guard vessel to furnish such information to Search and Rescue headquarters. He conceded, however, that subsequent to this tragedy such an order was promulgated. Captain Waters further testified that there was in effect "a general prudential rule" that regardless of a unit's status for patrol assignment, should a case arise which in the opinion of the commanding officer is beyond the unit's capabilities he shall immediately advise the Commander, First Coast Guard District. I find that as of December 18, 1961 the Coast Guard

in effect had made the commanding officer of each vessel the sole judge of the capability of that vessel to perform an assigned mission.

The scope of the authority and responsibility of Lt. McManus, and the extent to which the Coast Guard vested in him complete responsibility for making decisions pertaining to this mission, are further established by the testimony of Capt. Waters as to the decision to cancel the sailing orders of the FREDERICK LEE, "The commanding officer on the seas is in the best position to know what his situation was * * * we felt he was in the best position to know what was happening there." Neither Waters nor anyone else at Search and Rescue headquarters exercised any independent judgment whatever in making this decision, but instead relied solely on McManus' judgment that he required no further assistance, despite the fact that they had available to them at that time weather information indicating that the CG–95321 was then operating in conditions which according to the guidelines set up by Search and Rescue (Govt. Ex. 2) indicated that it could not "operate at maximum efficiency * * * and its safety might even be jeopardized under such adverse sea conditions," and despite the fact that larger vessels were available. In view of the information available to him Waters was negligent in abdicating his responsibilities and rubberstamping the decisions of the inexperienced immature McManus.

I rule that because of his position as Staff Search and Rescue Officer, First Coast Guard District, Waters was an "executive officer, manager or superintendent whose scope of authority included supervision over the phase of the business out of which the loss or injury occurred," and that his knowledge is chargeable to his principal, the United States. And I further

rule that under the method of procedure and division of responsibility followed by the Coast Guard, McManus also was an "executive officer, manager or superintendent whose scope of authority included supervision over the phase of the (Coast Guard's) business out of which the loss or injury occurred," and, therefore, that the United States is not entitled to limitation of liability.

The petition for exoneration from or limitation of liability is denied and the case will stand for the assessment of damages.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT, U. S.

FILED

JUN 16 1967

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1423~~ 192

UNITED STATES OF AMERICA,
PETITIONER,

v.

SANDRA & DENNIS FISHING CORPORATION, ET AL.,
RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1966

No. 1423

UNITED STATES OF AMERICA,

PETITIONER,

v.

SANDRA & DENNIS FISHING CORPORATION, ET AL.,

RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Question Presented

The question presented by the petitioner is simple but as stated is not couched in the language of the case and has no application to the facts and circumstances of the case. The question couched in the language of the case is as follows:

Where the Government provided a SAR service and organization on a grand scale, engendering reliance on the excellent service rendered and pre-empting the field, is there a duty owed to a disabled fishing vessel taken in tow by a Coast Guard patrol vessel on a routine SAR mission

to navigate with reasonably good seamanship so as not to tow the said fishing vessel on well-known shoals?

The respondents reserve the subsidiary question, namely, can the Court below upon examining the record to determine whether the findings of fact and the conclusions of the District Court are clearly erroneous, adopt discarded testimony, engage in inferences of its own, select testimony that it regards as more credible and in short grant a trial *de novo* contrary to the clear pronouncements of this Court?[1]

II. Statement of the Case

The statement in the petition is inadequate and a more complete statement is necessary.

The petitioner (Government) brought a petition for exoneration or limitation of liability for the loss of a fishing vessel (Barbara and Gail) with the resulting death of five of her crew and personal injuries to four of her survivors (R. 19). This casualty occurred on December 19, 1961, shortly before 1:25 a.m. (G. Ex. 37, R. 637, G. Ex. 39, R. 639) when a Coast Guard patrol vessel (95321) on a routine SAR mission, in weather not severe and in good visibility (G. Ex. 52, R. 655) towed the fishing vessel on well-known, dangerous shoals, Rose and Crown Shoals (R. 295, Petition 25, 61) when considerably off course, 6-7 miles (R. 292, Pet. 25, 61) due to faulty navigational instruments and navigation (Pet. 33-35, 45-47, 66), it mistook the light of Sankaty Head Lighthouse for the light of

[1] The Court below discarded the finding of the District Court that the commanding officer of the Coast Guard patrol vessel was negligent in failing to identify Sankaty Head Lighthouse and mistaking it for Great Round Shoals buoy light (Pet. 28, Footnote 7, 29 Footnote 8, 55 to 59, 66) and the finding that the tow line parted due to negligence (Pet. 27, Footnote 6, 48-50).

Great Round Shoals (GRS) buoy that it was expecting to see (Pet. 56-58, 66).

After a lengthy trial, the District Court rendered an opinion containing its findings of facts and conclusions (Pet. 41-73) and entered a decree thereon denying both exoneration and limitation of liability (R. 571). In summary, the District Court judge held that since the Coast Guard undertook a SAR service and operated a SAR organization, engendering reliance on the competent assistance usually afforded by the vessels engaged therein, it was obligated to use due care to maintain said vessels and their equipment in reasonably good working order; *and* if the said vessels and its equipment were not reasonably fit for the job, then the Coast Guard was *further* obligated to use due care to discover said fact and to repair them or give warning of their unfitness, paraphrasing the language used by this Court in *Indian Towing Co. v. U.S.*, 1955, 350 U.S. 61, 69 (Pet. 65-66). The District Court judge said that the Government closes its eyes to reality when it equates the Coast Guard's rescue operations to that of a private salvor who goes to the aid of a vessel in distress (Pet. 64). The nature and extent of these activities are so well known that all those who go down to the sea in ships have been induced to rely on this usual excellent service and to forego other means of assistance (Pet. 64-65). The District Court judge also held that having undertaken the mission due care must be exercised in performing the mission and it denied exoneration because (1) the Coast Guard assigned to the mission, a vessel equipped for a long time with a defective loran, a defective gyro-compass and repeater, a defective fathometer and a totally inoperative radio-direction finder, RDF, (Pet. 45-47, 66); (2) the commanding officer of the patrol vessel (McManus) had failed to report to SAR Headquarters his vessel's incapabilities due to the mass of

defective navigational equipment (Pet. 66);[2] (3) McManus undertook the mission with the mass of defective navigational equipment (Pet. 66); (4) McManus failed to inform the fishing vessel that he was navigating with this mass of defective navigational equipment (Pet. 66); (5) McManus relied on his defective loran and assumed he got accurate readings therefrom (Pet. 66); (6) McManus committed an incredibly reprehensible act when he shut off his loran on December 18th at 11:40 p.m. because it failed completely without obtaining a loran bearing from the fishing vessel (Pet. 54, 66); (7) McManus failed to identify Sankaty Head Lighthouse and mistook it for Great Round Shoals buoy (Pet. 55-59, 66); and (8) that these negligent acts and omissions were the proximate causes of the losses suffered by the respondents (Pet. 66).[3]

The District Court judge ruled that the claimants do not have to prove that they were deprived of available assistance from other sources as the Government contended, but if such proof is required then the record discloses (1) that the fishing vessel had a ship-to-shore radio telephone in good working order; (2) that the fishing vessel was on fishing grounds commonly used by the New England fishing fleet; and (3) that it did pass up other available assistance (Pet. 67-68).

The District Court judge ruled that the loss of the Barbara and Gail with its resultant deaths and personal injuries to her crew was an independent and distinguishable injury from the peril it faced when the tow line was

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[2] At the time of this mission SAR vessels were not required to report to SAR Headquarters their incapabilities, subsequently corrected (R. 149-150, Pet. 71). However, there was a General Prudential Rule which required a commanding officer assigned to a mission to report to SAR Headquarters his vessel's incapabilities (R. 150, G. Ex. 21, R. 607, Pet. 71).

[3] There were other negligent acts or omissions found, such as failure to take the southerly route which was slightly longer but shoal free (R. 359-360, Pet. 66).

first attached or reattached (Pet. 68-70). According to the Government's expert (Bumpus) if the fishing vessel were allowed to drift from its position when the tow line was attached, it would have drifted out through South Channel, clear of any shoals (Pet. 69). The trial judge rejected Bumpus' testimony that if the tow line was not reattached it would have drifted onto shoals for it assumes that the fishing vessel would not have used her dredges as sea anchors and assumes weather conditions that the log of the 95321 refutes (Pet. 69-70).

The Court below on review of the opinion of the District Court and upon examination of the record affirmed the decree insofar as it denied limitation of liability with instructions to enter a new decree granting limitation of liability (Pet. 39). The Court below ruled that (1) there is no duty owed by the Coast Guard to a disabled vessel to use due care to maintain their vessels and their equipment in reasonably good working order (Pet. 31); (2) that the only duty owed to a disabled vessel is to warn it of any unfitness for the mission and exercise good seamanship in performing the mission (Pet. 31); (3) that there was no duty to warn the fishing vessel in this case because the Court below rejected the District Court's finding that the 95321 was not fit for the mission and substituted its own finding that it was, adopting the testimony of Waters that the mission could be accomplished at the time it was commenced, bearing in mind the moderate weather and good visibility, in spite of its mass of defective navigational instruments[4] (Pet. 32); that McManus' failure to report his vessel's deficiencies under the General Prudential Rule (G. Ex. 21, R. 607) was irrelevant because of the adoption of Water's testimony by the Court below (Pet. 39).

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[4] The Court below said that Waters could have added a further fact that the 95321 had available the loran of the fishing vessel for the asking (Pet. 32, Footnote 14).

The Court below held that whatever may be the limits of the principle with respect to volunteered salvage, if the Coast Guard accepts a mission, it should conduct its share of the proceeding with acceptable seamanship. "We refuse to take the Government's view, and be party to adding to the honored motto, '*Semper Paratus*', the words '*Interdum Prudens*'" * (Pet. 36). It affirmed that part of the decree denying exoneration of liability because it held that (1) when McManus last set his course for New Bedford at 11:00 p.m. on December 18th, his loran position was inaccurate for he could not possibly have stranded where he did if it were accurate (Pet. 35); (2) McManus placed false confidence upon his defective loran and assumed he got correct positions from it (Pet. 33-34); (3) that at 11:45 p.m. on December 18th when the loran broke down completely, he shut it off and failed to avail himself of the fishing vessel's loran which was available for the asking and this was a highly irresponsible act (Pet. 34), and (4) had he done so, he would have discovered his error and the casualty would have been avoided (Pet. 35).

The Court below was unimpressed, as was the District Court, with the Government's claim that had the 95321 not appeared at all, the fishing vessel would have been lost in any event and that this contention requires no discussion (Pet. 37).

III. Reasons for Denying the Writ

A. The Petitioner Has Not Been Aggrieved.

1. The petitioner argues that the Court below has imposed a higher duty upon the Government when engaged on a SAR mission than that imposed upon a private ship-

* "Always ready, Sometimes careful".

owner. As a matter of fact the duty imposed by the Court below was merely to exercise reasonably good seamanship in performing the mission, if the Government undertook it. The Court below said it would not tarnish the motto, "Always Ready", by adding, "Sometimes Careful" (Pet. 36).

It should be noted that this is not a case of an unsuccessful rescue attempt under trying circumstances where a court can regard the situation with a benevolent eye (*Frank* v. *U.S.*, 1957 3rd Cir., 250 F.2d 178, 180). Here the fishing vessel was under tow and it became merely a matter of navigation. If one were to apply the duty that was owed by a private salvor (Good Samaritan) it would be to exercise reasonable care over the property or persons in his custody (*The Noah's Ark* v. *Bentley & Felton Corp.*, 1961, 5th Cir., 292 F.2d 437, 440; Norris, *Law of Salvage*, 1958, § 120 at 205-206; *U.S.* v. *Lawter*, 1955, 5th Cir., 219 F.2d 559, 562; *Geerston* v. *U.S.*, 1955, 3rd Cir., 223 F.2d 68, 70-71; *The Cape Race*, 1927, 2nd Cir., 18 F.2d 79, 81).

The District Court by its findings resolved the question that the petitioner has posed. Even employing the standard of law applicable to a private salvor (Good Samaritan) it found as a fact (a) that the plight of the fishing vessel was worsened by reason of the SAR mission (Pet. 67-69) and (b) the claimants sustained both an independent and distinguishable injury (Pet. 70). The Court below stated that it was unimpressed as was the District Court, that the fishing vessel would have been lost in any event had the rescue mission not been undertaken and that its unsuccessful attempt to establish this contention required no discussion (Pet. 37). It is, of consequence, to note that the petitioner has not argued that these findings of fact are *plainly wrong*.

The petitioner relies heavily on *Frank* v. *U.S.*, 250 F.2d 178, 179, quoting therefrom but it fails to realize that the court clearly understood (a) that the Coast Guard was in

no way responsible for Frank's falling into the sea and (b) owed no duty to rescue him as in the case of a crew member or passenger who falls into the sea.[6]

2. The petitioner got the benefit of better law than what it was entitled to.

The Court below ruled that the Coast Guard was not obligated to use due care to maintain its vessels and their equipment employed in SAR missions in reasonably good working order but merely to give warning of any unfitness of its vessel for the mission contrary to a clear pronouncement of this Court in *Indian Towing Co.* v. *U.S.*, 1960, 350 U.S. 61, 69 and the duty owed was merely to perform the mission with reasonably good seamanship, if it undertook the mission (Pet. 31, 35-36). The Court below upset basic findings of the District Court that were not *plainly erroneous*[7] and granted a trial *de novo* contrary to clear pronouncements of this Court (*McAllister* v. *U.S.*, 1954, 348 U.S. 19, 20; *Guzman* v. *Pichirilo*, 1962, 369 U.S. 698, 702; *Morales* v. *City of Galveston*, 1962, 370 U.S. 165, 167-168.

The petitioner fails to comprehend that the duty owed by the Government in a SAR mission is likened to that of

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[6] The court said, (a) "There has been no showing that any fault of the Coast Guard contributed in any way to Frank's falling into the sea. Nor did the Coast Guard in any way worsen his plight thereafter" (P. 179) and (b) "An obligation to render aid may grow out of a relationship such as master and servant or ship and crewman, cases cited. But there is no such relational basis for a duty here" (P. 180).

[7] The Court below upset basic findings of the District Court (a) that the C. G. 95321 was not a proper vessel to dispatch for the mission (claimants' Pet. 9, 14-15); (b) that McManus was negligent in failing to identify Sankaty Head lighthouse and mistaking it for GRS buoy light (Pet. 28, Footnote 7, 29 Footnote 8, 55-59, 66); (c) that the tow line parted due to negligence (Pet. 27, Footnote 6, 48-50) and that the commanding officer of the C. G. 95321 was negligent in failing to take the southerly route which was slightly longer but shoal free (claimants' Pet. 7, Footnote 2).

a private person only in such circumstances where private persons render the same service *under like circumstances* and to the extent that the circumstances differ, the duties owed by the Government vary but do not fail (*Indian Towing Co.* v. *United States*, 1955, 350 U.S. 61, 68-69; *Rayonier, Inc.* v. *United States*, 1957, 352 U.S. 315, 319-320; *United States* v. *Gavagan*, 280 F.2d 319, 327-328).

The Government undertook SAR as a governmental function on a grand scale (R. 74-75, 146-147, Pet. 64-65) which it was permitted to do by statute (14 U.S.C. § 88 (a) (1)), and (b) (Claimants' Pet. 53), and directed to do by the National Search and Rescue Plan promulgated in March, 1956 by the President's Air Co-ordinating Committee (*United States* v. *Gavagan*, 280 F.2d 319, 322, 5th Cir., 1960). These services, all well publicized, known to mariners who rely upon and avail themselves of them to the exclusion of others competent of rendering such service (Pet. 64-65). The duty owed by the Government in performing such a SAR service can hardly be equated to that owed by a private salvor who acts as a Good Samaritan. As pointed out in *U.S.* v. *Gavagan*, 280 F.2d 319, 324-328, the Government unlike a private salvor has no right, either absolute or qualified, to abandon or withdraw from the mission and was bound to continue the mission until good judgment required termination. To equate the duty of the Government to a private salvor, it would have to be a private salvor engaged in the business on a scale equal to that of the Government.[8]

Since there is no such private salvor a court must fashion the duty. It is characteristic of the maritime law to apply a single standard of care in nearly every situation dis-

[8] A private salvor in the business of salvage warrants both his equipment and his workmanship (*Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 1956, 350 U.S. 124, 132-134 culminating in *Italia Societa* v. *Oregon Stev. Co.*, 1964, 376 U.S. 315, 320).

daining the refinements of the common law (*Kermarec* v. *Compagni Generale Transatlantique*, 1959, 358 U.S. 625, 630-632). The least that can be expected of the Government performing a SAR service is once it takes the vessel in tow is to navigate with reasonably good seamanship.

IV. Conclusion

The petitioner is really seeking a review in this Court to upset the finding of fact of the District Court affirmed on appeal that the Government is solely to blame for the tragic loss of the claimants (Pet. 11, Footnote 8, Pet. 38, Claimants' Pet. A52). For the aforesaid reasons this petition should be denied without prejudice to the claimants' petition heretofore filed (docket number 1404).[9]

Respectfully submitted,

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[9] The respondents are: Ellis Kendall, Edgar Lawrence Kent, Yves Adrien Redureau, Clarence Roberts, Fred M. Thomas, Admr. of Estate of Roger Desroches, David J. Grant, Admr. d/b/n Estate of Calvin Roberts, Maria do Carmo Costa, Admx. of Estate of Joseph Costa, Jr., Judith Wicherski, a minor by Fred M. Thomas, Mary Wicherski, Admx. of Estate of Walter Wicherski and Eleanore McCarthy, Admx. of Estate of Terrence McCarthy.

SUPREME COURT, U. S.

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 192
Formerly No. 1423

UNITED STATES OF AMERICA,
PETITIONER,

v.

SANDRA & DENNIS FISHING CORPORATION, ET AL.,
RESPONDENTS.

BRIEF FOR THE SANDRA & DENNIS FISHING CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT CASE NO. 6637. (P & I INSURER)

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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Supreme Court of the United States

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BRIEF FOR THE SANDRA & DENNIS FISHING CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT CASE NO. 6637. (P & I INSURER)

This Brief is filed on behalf of the P & I Insurers of Sandra & Dennis Fishing Corporation in opposition to the petition for certiorari in the U. S. Court of Appeals for the First Circuit, Case No. 6637.

Statement of Proceedings Below

Attorneys for the P & I Insurers of Sandra & Dennis Fishing Corporation timely filed a petition for exoneration from or limitation of liability (United States District Court, District of Massachusetts 62-27-C) in which proceeding the United States filed no claim until after the entry of several decrees prohibiting the filing of such claims. (No. 6637 RA 99a, RA 19a-20a, 2a.) From the denial of its various motions, it appealed.

The appeal, No. 6637, was briefed and argued on questions of (1) the standing of the United States to appeal, (2) the timeliness of the appeal, and (3) whether the District Court had abused its discretion in refusing to permit the late filing. These questions were never decided by the Court of Appeals because of intervening developments in the United States limitation petition (U.S. District Court, District of Massachusetts 63-27-C; Court of Appeals No. 6772). In that case, the P & I Insurers withdrew their claim for indemnity, leaving in the case only the claim of hull underwriters seeking reimbursement of the $25,000 paid on a loan receipt for the loss of the hull. (No. 6637 RA 92a-96a).

The District Court found the United States solely at fault, thus rendering temporarily moot any question of its right to file a late claim in 6637. When the Court of Appeals affirmed the finding of sole fault in 6772, it decided that the questions raised in 6637 were permanently moot, and dismissed the appeal.

The United States now seeks review of that dismissal.

Argument

1. The United States has advanced no reason to grant the petition for certiorari in case No. 6637. It does not

argue any conflict among the circuits or important question of federal law, or any other basis for review.

2. No case in conflict with the First Circuit decision of mootness has been found. The procedural posture of the case is so unique as to be academic. No basis for certiorari has been shown.

3. The questions involved in No. 6637 will remain moot until this Court: (a) grants certiorari, and (b) changes the outcome of the decision in case No. 6772. There is, consequently, no basis for review at this time of case No. 6637.

If, because of action of this Court in 6772, the issues in 6637 become no longer moot, this Court should await the benefit of consideration of such issues by the Court of Appeals before deciding if review is required.

Conclusion

Certiorari should be denied with respect to Court of Appeals, First Circuit, Case No. 6637.

Respectfully submitted,

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